Supreme Court, U.S.
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No. 03-129

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In The
Supreme Court of the United States

PUERTO RICO AND THE CARIBBEAN CARDIOVASCULAR CENTER CORP.,

Petitioner,

v.

FRESENIUS MEDICAL CARE CARDIOVASCULAR CENTER CORP.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Under this Court's decisions in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994), and *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997), must federal courts give substantial deference to a state's legislative and policy decisions in structuring entities that would qualify as arms-of-the-state and thus be entitled to Eleventh Amendment immunity?

2. To the extent that *Hess* has been interpreted by the courts of appeals to give dispositive weight to whether a state would be responsible for the financial obligations of one of its entities, is such consistent with this Court's later rulings emphasizing the dignity interest of arms-of-the-state not being haled into federal court?

3. Should a specialized medical care, research and training facility, established by a state legislature, fully integrated into a state's public health care system, and at least to some degree funded and indemnified by a state government, be deemed an arm-of-the-state for purposes of Eleventh Amendment immunity?

LIST OF PARTIES BELOW

The parties to this case below are as reflected in its caption.

RULE 29.6 NOTICE

Petitioner, Puerto Rico and the Caribbean Cardiovascular Center Corporation, is a governmental entity created by the Commonwealth of Puerto Rico, and has no shareholders or parent corporations.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Puerto Rico and the Caribbean Cardiovascular Center Corporation, respectfully prays that a writ of certiorari issue to review the March 6, 2003, judgment and opinion of the U.S. Court of Appeals for the First Circuit in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the First Circuit, of March 6, 2003, *Fresenius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico and the Caribbean Cardiovascular Center Corp.*, Docket No. 02-1763, is reported at 322 F.3d 56 (1st Cir. 2003), and is reprinted at App. 2a. The First Circuit's denial on en banc review was issued on April 25, 2003, and is reprinted at App. 1a.

The First Circuit opinion was issued in response to an appeal of two unreported opinions and orders by the U.S. District Court for Puerto Rico of March 18, 2002, reprinted at App. 38a, and of May 7, 2002, reprinted at App. 54a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the U.S. Court of Appeals for the First Circuit of March 6, 2003. The First Circuit denied a petition for rehearing and suggestion for rehearing en banc on April 25, 2003. App. 1a. The U.S. Supreme Court has jurisdiction to review cases from federal courts of appeals by virtue of 28 U.S.C. § 1254(1) (2000).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This Petition implicates the manner in which state entities are endowed with arm-of-the-state status and immunity under the Eleventh Amendment: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST., amend XI.

The particular state entity in question here is the Puerto Rico and the Caribbean Cardiovascular Center Corporation, the organic statute for which, 24 P.R. Laws Ann. §§ 343-343k (2000), is reprinted at App. 58a.

STATEMENT

1. a. In 1986, the Commonwealth of Puerto Rico legislature enacted a statute creating the Petitioner, Puerto Rico and the Caribbean Cardiovascular Center Corporation ("PRCCCC"). 24 P.R. Laws Ann. §§ 343-343k (2000); App. 58a. PRCCCC was established as a "public corporation" and was legislatively authorized to "function as an entity which is independent and separate from *any other* agency or instrumentality of the Government of the Commonwealth of Puerto Rico...." 24 P.R. Laws Ann. § 343a (2000) (emphasis added); App. 58a.

The broad purposes of the PRCCCC were to have "the responsibility of framing or executing public policy with regard to the planning, organization, operation and administration of the cardiovascular services to be provided in Puerto Rico." 24 P.R. Laws Ann. § 343b (2000); App. 58-59a. PRCCCC was also given the function of coordinating the Commonwealth's

cardiovascular health policies by liaising with the Commonwealth's Department of Health, the Medical Sciences Campus of the University of Puerto Rico, the Medical Services Administration (all government entities) and the private sectors involved in providing cardiovascular care in Puerto Rico. Id.; App. 59a. These broad purposes and functions were pursuant to the Commonwealth of Puerto Rico's Constitution which provides that Commonwealth citizens have the right to "a standard of living adequate for the health and well-being of himself and of his family, and especially to . . . medical care and necessary social services." P.R. CONST. Art. II, § 20 (excepted from the approval of the Constitution by Joint Resolution of Congress of July 3, 1952, c. 567, 66 Stat. 327).

The officially enacted Statement of Motives for the PRCCCC Act specifically indicated that among the primary functions of the entity was "the training of professionals in the cardiovascular field" and "to encourage professional excellence in the formation of health professionals in the area of cardiovascular disease, maintaining professional quality through continuing education programs in this dynamic field of modern medicine." Act of June 30, 1986, No. 51, 1986 P.R. Laws 171. The statutory preamble also indicated that the PRCCCC would "have a research function with special emphasis on those most frequently encountered cardiovascular diseases in Puerto Rico in order to develop methods, techniques and treatments to confront them more adequately." Id. In short, the PRCCCC was intended "for the purpose of eliminating or mitigating the ailments of cardiovascular patients as well as to promote teaching, study, research and the intellectual development of the health care professionals in this highly specialized field of medicine." Id. at 171-72.

PRCCCC was given broad powers by the

Commonwealth legislature. Some of these were consistent with the establishment and operation of a cardiovascular hospital intended to serve Commonwealth citizens, particularly that large percentage which is indigent. See 24 P.R. Laws Ann. §§ 343b (b), (c) (d) & (l) (2000); App. 59a-60a. But other of the enumerated powers were clearly in line with the organization of a governmental unit. See id. §§ 343b (e) - (k), (m) - (r) (2000); App. 59a-61a. PRCCCC, by statute, was exempted from "all types of taxes, duties, imposts or fees, including license fees, imposts or those imposed by the Commonwealth of Puerto Rico or any of its political subdivisions, including all of its operations, movable or immovable properties, capital, income and surplus." 24 P.R. Laws Ann. § 343e (2000); App. 63a. The PRCCCC's premises are located on Commonwealth property. 24 P.R. Laws Ann. §§ 343f & 343g (2000); App. 64a. The enabling act for the PRCCCC takes care to exempt the entity from certain laws governing Puerto Rico governmental units, on the assumption that without such a provision these would normally apply to it. 24 P.R. Laws Ann. § 343j (2000); App. 65a. The PRCCCC was also given the authority to issue bonds, backed by the PRCCCC's assets, including real property (owned by the Commonwealth), and the interest on such bonds was declared to be tax exempt. See 24 P.R. Laws Ann. § 343k (2000); App. 65a-67a.

b. By statute, the PRCCCC is placed under the control of a Board of Directors. The Board is composed of seven voting members of which three serve by virtue of their office: the Secretary of Health of Puerto Rico, the Rector of the Medical Sciences Campus of the University of Puerto Rico, and the Executive Director of the Commonwealth of Puerto Rico Medical Services Administration. The four remaining members are appointed by the Governor for four-year terms, and the seats

are allocated based on the experience and qualifications of the members. The Commonwealth's Secretary of Health serves as Chairman of the Board, and that official designates the other Board officers. See 24 P.R. Laws Ann. § 343c (2000); App. 61a-62a. The Board designates the Executive Director and Medical Director of PRCCCC. Id.

The PRCCCC Board is obliged, by statute, to "submit an operating expenses and capital investments budget to the Legislature, through the Office of the Governor, which should contain a statement of estimated income and a disbursement program based on a working plan and the services to be rendered by the Corporation." 24 P.R. Laws Ann. § 343h (2000); App. 64a. Additionally, the PRCCCC must submit semiannual reports to the Commonwealth Governor, and PRCCCC is subject to audit by the Commonwealth's Comptroller. See 24 P.R. Laws Ann. § 343i (2000); App. 65a. PRCCCC Board members are removable at will by the Commonwealth Governor.

c. The fiscal history of PRCCCC is admittedly complex, and subject to some dispute.[1] For purposes of the

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[1] For clarity, the statistics presented here are drawn from the district court's findings of fact and the court of appeals' opinion. Petitioner believes that some of these figures are clearly erroneous, and the legal conclusions drawn therefrom concerning PRCCCC's status constitute legal error. These errors tended to substantially understate the PRCCCC's financial dependence on Commonwealth funding, including contributions made by Puerto Rico executive branch and agencies (and not just direct legislative appropriations), as well as funds from government indemnifications and reimbursements to the PRCCCC (erroneously disregarded as insurance payments). All told, Petitioner would submit that Puerto Rico currently provides well over half of the PRCCCC's operating

present Petition, it suffices to note that PRCCCC has, for the past years, operated at a substantial budget deficit, with expenses exceeding operating revenues by many millions of dollars. See App. 32a, 35a, 45a. Indeed, it may well have been contemplated at the time that PRCCCC was created that it would incur such deficits and that the Commonwealth of Puerto Rico would make up any shortfalls from its budget. In the organic statute establishing the PRCCCC, an initial appropriation to PRCCCC's working capital was made from the Commonwealth budget in the amount of $500,000. Moreover, the statute provided that "[t]he funds needed in subsequent years to carry out the purposes of this act shall be consigned in the General Expense Budget of the Government of Puerto Rico." Act of June 30, 1986, No. 51, § 13, at 170, noted at 24 P.R. Laws Ann. § 343; App. 68a.

Also undisputed is that, prior to 1993, PRCCCC received all its funding from the Commonwealth, and that from 1993 to 2001, at least an average of 14 percent of its total revenues from direct legislative appropriations from the Commonwealth of Puerto Rico, or $51 million in appropriations out of a total of $373 million in revenues. App. 34a, 46a. Direct appropriations accounted for over 21 percent in some years, including FY 1993 and 1994. Id. This figure is understated because the Commonwealth has delayed collection of, or outright forgiven, the PRCCCC's other debts, including the rental of property owned by the government. Additionally, this figure does not take into account the reimbursements and indemnifications the Commonwealth offers to the PRCCCC. When these are added to the total, the Commonwealth's contribution to the PRCCCC's operating

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budget.

revenues ranged between 64 percent (in FY 1993 and 1994) to 26 percent (in FY 2000 and 2001). See App. 34a-35a.

2. a. The underlying facts that gave rise to this Petition involve a contractual dispute for the provision to PRCCCC, by certain predecessor entities of Fresenius Medical Care, of perfusion services using artificial pumps in open-heart surgeries. Fresenius sued PRCCCC in federal court for breach of contract and the covenant of good faith and fair dealing, and sought $7 million in damages as well as specific performance and a declaratory judgment. App. 38a. PRCCCC moved to dismiss Fresenius's suit, under Fed. R. Civ. P. 12(b)(1), owing to PRCCCC's arm-of-the-state status and its consequent Eleventh Amendment immunity to suit in federal court. App. 38a, 40a.[2]

The district court denied PRCCCC's motion to dismiss on Eleventh Amendment grounds.[3] App. 52a. After holding that Eleventh Amendment immunity extended to Puerto Rico, App. 44a, the district court applied the First Circuit's test from *Metcalf & Eddy v. Puerto Rico Aqueduct & Sewer Auth.*, 991

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[2] In ruling on PRCCCC's Rule 12(b)(1) motion, the district court looked outside the pleadings to find facts relevant to PRCCCC's status. App. 40a. Somewhat inexplicably, the court of appeals treated PRCCCC's motion as brought under Rule 12(b)(6) and, moreover, converted it to a motion for summary judgment under Rule 56. App. 22a & n.13.

[3] Other grounds for dismissal, including Fresenius's lack of standing and improper service of PRCCCC were also rejected by the district court, App. 41a-43a, and although the latter was renewed before the court of appeals, these issues are not placed before this Court in this Petition.

F.2d 935 (1st Cir. 1993), to conclude that PRCCCC received insufficient funding from the Commonwealth to be considered an arm-of-the-state for Eleventh Amendment purposes, and that even though PRCCCC was running operating deficits that the Commonwealth was statutorily obliged to cover, the district court held that under First Circuit authority, and this Court's precedents, such a duty was not enough to trigger arm-of-the-state status. App. 47a-48a (citing *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)).

The district court then considered other factors bearing on PRCCCC's legal status. As for PRCCCC's functions, the district court held, App. 49a-50a, again based upon First Circuit cases predating this Court's decisions in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994), and *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997), that operating a hospital was essentially a private business, and specifically disavowed the Puerto Rico legislature's assignment to PRCCCC of "the responsibility of framing or executing public policy with regard to . . . cardiovascular services to be provided in Puerto Rico." 24 P.R. Laws Ann. § 343b (2000); App. 58a. Likewise, the district court questioned the amount of authority Puerto Rico's Governor exercised over the PRCCCC Board of Directors, despite the fact that three of its members (including its chair) are gubernatorial political appointees or cabinet members. App. 51a. The district court also concluded that PRCCCC had access to outside sources of funding, and that even though Puerto Rico's credit was at stake in such transactions, such did not lead to a finding of arm-of-the-state status. App. 51a-52a.

On PRCCCC's motion for reconsideration, the district court criticized PRCCCC's reliance on cases decided by this

Court after the First Circuit's ruling in *Metcalf & Eddy*, including *Hess*, and the district court ruled that *Hess* was inapposite to a case involving something other than a bi-state compact entity. App. 55a-57a. The district court reaffirmed its ruling that PRCCCC's functions in operating a cardiovascular health clinic were traditionally a private sector activity, and thus effectively disqualified it as an arm-of-the-state. App. 56a-57a.

b. PRCCCC took an interlocutory appeal of the denial of its arm-of-the-state status, as per this Court's holding in *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), and the First Circuit affirmed. App. 37a. The court of appeals took no issue with extending Eleventh Amendment immunity to Puerto Rico and its arms-of-the-state, see App. 7a, and articulated the question as being one of reconciling its own arm-of-the-state jurisprudence with that of this Court in the wake of *Hess* and *Regents of the Univ. of Cal.* App. 2a ("This case . . . .causes us to reshape this circuit's arm-of-the-state test in light of intervening Supreme Court precedent."); App. 21a. The court of appeals then proceeded to canvass the different sorts of state entities notionally entitled to Eleventh Amendment immunity, and this Court's divergent treatment of bodies within each category. App. 7a-9a.

Looking at the larger canvass of this Court's Eleventh Amendment jurisprudence, the First Circuit articulated a number of reasons why a federal court should be reticent in granting arm-of-the-state status to a particular state entity, App. 12a-14a, and essentially fashioned a judicial presumption against arm-of-the-state status. Moreover, the First Circuit repeatedly observed in its opinion that the burden of proof is on the entity claiming arm-of-the-state status to carry its

burden. See App. 7a, 11-12a, 26a, 29a n.20, 33a; but see 40a (where the district court reached an opposite conclusion).

The First Circuit then turned to analyzing the impact of *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994), on the status of special-purpose public corporations. The court of appeals characterized the *Hess* analysis as a two-step process in which, first, the structure of an entity would be assessed to see if a state substantially controlled the body, and, if such yielded no definitive result, then, second, the impact of a judgment on the state's treasury would be assessed. See App. 14a-16a. The First Circuit held that *Hess*'s two-step analysis was as applicable to what it called "intra-state entities," App. 17a, as to the bi-state compact entities at issue in *Hess*. App. 18a-19a (citing *Auer v. Robbins*, 519 U.S. 452, 456 n.1 (1997)). As for whether the ruling in *Hess* was viable in the aftermath of this Court's rulings in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and *Fed. Mar. Comm'n v. S.C. Ports Auth.*, 535 U.S. 743 (2002), which both emphasized the dignity interest of states in resisting federal court jurisdiction, the First Circuit held that "*Hess* binds us and has not been overruled. . . . [and we] must follow it until the Supreme Court decides otherwise." App. 20a-21a.

Ultimately, the First Circuit held that the arm-of-the-state standard of its previous decision in *Metcalf & Eddy* was consistent with *Hess* and remained applicable in cases involving special-purpose public corporations. App. 19a, 21a, 22a. In turning to the structure and functioning of the PRCCCC, the First Circuit noted that the enabling act for the entity, 24 P.R. Laws Ann. § 343 et seq. (2000); App. 58a, presented a "closer case" for PRCCCC's arm-of-the-state status than did the entities at issue in earlier First Circuit decisions, including *Metcalf & Eddy*. App. 24a. Nonetheless,

the court rejected a construction of 33 P.R. Laws Ann. § 3022 (2000), that would have qualified PRCCCC as an arm of the Commonwealth government. App. 24a-26a. Even more significantly, the First Circuit concluded that the PRCCCC's mission of providing health care services was assimilable to a "private sector hospital," App. 29a, and despite the PRCCCC's statutorily-conferred policy responsibilities, the Circuit concluded that these were insufficient indicia of governmental functions. And as for the Government of Puerto Rico's control over PRCCCC, the First Circuit concluded that there were "indicia of control, but hardly determinative in view of the [PRCCCC's] statutory structure." App. 30a. The court of appeals appeared to reach this holding under the majority opinion in *Hess*, although it expressed some concerns that a different outcome might obtain under the *Hess* dissent. Id. n.21 (citing and quoting *Hess*, 513 U.S. at 61 (O'Connor, J., dissenting)).

The First Circuit concluded that "[w]e cannot say that the indicia all point in the direction of PRCCCC being an arm of the state and so we reach the second stage of the analysis," id., whether the Commonwealth treasury would effectively be responsible for a judgment against PRCCCC. Once again, the court of appeals diminished the effect of statutory language that appeared to pledge Commonwealth legislative appropriations to cover PRCCCC debts. App. 32a-33a (discussing P.R. Act of June 30, 1986, No. 51, at 170, § 13). In examining the PRCCCC's fiscal history, the court of appeals concluded that Commonwealth financial support of PRCCCC had dropped over the years, and that total Commonwealth funding in FY 2000 and 2001 amounted to 26 percent of PRCCCC's revenue. App. 34a-36a. The First Circuit held that

> The fact that PRCCCC receives significant, but diminishing, state funding (now less than thirty percent counting all sources, including insurance) is simply not enough to enable it to claim Eleventh Amendment immunity. *Mt. Healthy*, 429 U.S. at 280. In the end, PRCCCC's argument is simply that a judgment would deplete its operating funds, that the Commonwealth might choose to rescue it, and that this would indirectly deplete the state treasury. We rejected this very argument in *Metcalf & Eddy*, 991 F.2d at 941, and do so here.

App. 36a. The court of appeals thus held that PRCCCC is not an arm of the Commonwealth government and not entitled to Eleventh Amendment immunity in federal court. App. 37a.

REASONS FOR GRANTING THE PETITION

THE CIRCUITS ARE IN SUBSTANTIAL DISARRAY AS TO THE PROPER APPLICATION OF THIS COURT'S ARM-OF-THE-STATE JURISPRUDENCE

This Petition seeks the Court's guidance in resolving a vexatious and recurring aspect of its sovereign immunity jurisprudence: the qualifications for a governmental entity to be an arm-of-the-state for purposes of invoking the state's Eleventh Amendment immunity in federal court. It is an issue that this Court has been required to substantially address twice in the past decade – in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994), and *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997). Now, because of a sharp split in the courts of appeals' interpretation of these decisions, as

well as of the Court's most recent Eleventh Amendment pronouncements, it is necessary again for the Court to clarify the general principles and standards by which special-purpose public corporations are to be granted or denied arm-of-the-state status. Particularly in need of settlement are the considerations to be applied by federal courts in relation to those state entities involved in the provision of medical services and the development of sensitive state policies in the health care area.

The First Circuit ruling for which review is sought here was that despite the fact that the Puerto Rico and Caribbean Cardiovascular Center Corporation (PRCCCC) was established by the Commonwealth of Puerto Rico legislature as an "agency or instrumentality" of the Commonwealth, 24 P.R. Laws Ann. § 343a (2000); App. 58a, is fully integrated into the Commonwealth's public health care system, and is substantially funded and indemnified by the Puerto Rico government, this did not suffice to characterize it as an arm-of-the-state. Indeed, the First Circuit went so far as to systematically place four insurmountable hurdles for a state entity to qualify as an arm-of-the-state. These newfangled doctrinal requirements for arms-of-the-state are in dramatic tension with this Court's jurisprudence. Moreover, each of them illustrates a growing split in the circuits in the handling of arm-of-the-state cases.

1. a. First, the court below appeared to give not a whit of deference to the Commonwealth of Puerto Rico's own characterization of the PRCCCC as its agency or instrumentality, and endowed with the Commonwealth's Eleventh Amendment immunity. The First Circuit not only chose to read the relevant PRCCCC enabling statute in a narrow fashion, dismissing the relevance of no less than three

distinct provisions, see App. 24a-26a (interpreting 33 P.R. Laws Ann. § 3022 (2000)); 27a-28a (glossing P.R. Const. art. II, § 20); 32a-33a (construing Act of June 30, 1986, No. 51, at 170, § 13), it essentially imposed a clear statement requirement for state legislatures to denominate public service corporations as arms-of-the-state. Indeed, the court of appeals at some length, App. 12a-14a, seemed bent on ordaining a presumption against finding an entity to be an arm-of-the-state, in spite of its acknowledgment that this Court's ruling in *Hess* did not require such a result, and, moreover, that consistent with this Court's later pronouncements in such cases as *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), and *Fed. Mar. Comm'n v. S.C. Ports Auth.*, 535 U.S. 743 (2002), a presumption in favor of arm-of-the-state status was consonant with the dignity interest of states. App. 17a-19a.

Although Petitioner is by no means suggesting that federal courts should give complete and total deference to state legislative and policy determinations in arm-of-the-state determinations, the First Circuit certainly erred in veering to the opposite extreme of extending virtually no solicitude to the state's own characterization of the entity. This is inconsistent with this Court's admonition in *Regents of the Univ. of Cal.*, that

> [u]ltimately, of course, the question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State, and therefore "one of the United States" within the meaning of the Eleventh Amendment, is a question of federal law. But that federal question can be answered only after considering the provisions of state law that define the agency's character.

519 U.S. at 430 n.5. Nonetheless, this court has never offered

a standard of deference by which state law will be "consider[ed]" in the context of arm-of-the-state inquiries. In this case, the First Circuit appeared, at every material step in the analysis, to substitute its judgment for that of the legislature and executive officials of the Commonwealth of Puerto Rico as to the public character of the PRCCCC. Indeed, it seems that the First Circuit has impliedly declined to accept that the Commonwealth's statutory ordering of its governmental programs and instrumentalities is entitled to the same substantial deference – nay, the same dignity – as those of States of the Union.

b. The First Circuit's methodology stands in sharp relief with the practice of other circuits, which routinely grant a measure of appreciation to a state's own legislative and judicial characterization of an entity. In *Harter v. Vernon*, 101 F.3d 334 (4th Cir. 1996), the Fourth Circuit held that "[a]s a matter of federal law, a court may consider both the relevant state statutes, regulations, and constitutional provisions which characterize the entity, and the holdings of state courts on the question. A federal court may 'give deference to the rationale used by a state court,' but the holding is not dispositive as a matter of federal law." Id. at 342 (citations omitted) (quoting *Ram Ditta v. Maryland Nat'l Capital Park & Planning Comm'n*, 822 F.2d 456, 460 (4th Cir.1987)); see also *Franchesci v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1994); *Mitchell v. Los Angeles Comm. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir.1988); *Duke v. Grady Mun. Schs.*, 127 F.3d 972, 978 (10th Cir. 1997).

The First Circuit's approach, of denying any deference to the Commonwealth's own determinations and declarations as to the status of legislatively-created entities, is certainly suspect in light of the jurisprudence of other courts of appeals. But it was also coupled with a repeated insistence that the entity seeking arm-of-the-state status discharge a high burden

of proof. See App. 7a ("the entity asserting Eleventh Amendment immunity[] bears the burden of showing it is an arm of the state."), 11a-12a, 26a ("It is PRCCCC's burden to [produce relevant court opinions showing a grant of arm-of-the-state status]"), 29a n.20 ("PRCCCC, which bears the burden of proof, offers only inadmissible hearsay evidence on this point."), 33a ("There is, moreover, no evidence in the record (and the burden is on PRCCCC) that PRCCCC took any steps to comply with this requirement. . . ."). This combination of requirements – a lack of deference and an imposition of stringent burden of proofs – while perhaps singly unobjectionable, together create an intolerable hardship on state entities in arm-of-the-state cases, and raises the specter of an affront to the dignity interest of states so often pronounced by this Court.

2. Second, the First Circuit's application of the *Hess* test for arms-of-the-state was manifestly flawed. The court of appeals appeared to require that, in the first step of the analysis, *all* of the indicia in determining whether an entity was effectively controlled by a state government had to point in favor of arm-of-the-state status before such would be conferred. App. 30a ("We cannot say the indicia all point in the direction of PRCCCC being an arm of the state and so we reach the second stage of the analysis.").

a. Nothing in *Hess* suggests the Court intended such an all-or-nothing analysis. See 513 U.S. at 44, 47. *Hess* concerned a bi-State Compact entity, implicating special federalism concerns under the Constitution's Compact Clause, and thus accounting for the Court's presumption against such entities being granted arm-of-the-state status. See id. at 40-42. The application of the *Hess* test to intra-state special-purpose public corporations would be much more problematic if it

demanded, as the court below appeared to hold, a confluence of all factors of control in demonstrating arm-of-the-state status. Likewise, nothing in this Court's previous ruling in *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977), suggests such a result, as other courts of appeals have recognized. See *Sturdevant v. Paulsen*, 218 F.3d 1160, 1166 (10th Cir. 2000); *Duke v. Grady Mun. Schs.*, 127 F.3d 972, 974 n.3 (10th Cir. 1997).

Nonetheless, one court of appeals' prediction in 1995 that this Court's opinion in *Hess* "is certain to generate confusion," *Gray v. Laws*, 51 F.3d 426, 431 (4th Cir. 1995), has, alas, been proven true. See also *Duke*, 127 F.3d at 974 n.4 ("Other courts have simply pointed out the difficulties and uncertainties in applying the Eleventh Amendment analysis, particularly after *Hess*."). As the Fourth Circuit observed, *Hess* was by no means clear in whether its test should even notionally apply to single state entities. See *Gray*, 51 F.3d at 432. One court of appeals has held, in contrast to the First Circuit's decision below, App. 17a, that it does not. See *Vogt v. Bd. of Comm'rs of the Orleans Levee Dist.*, 294 F.3d 684, 689 n.2 (5th Cir. 2002); *Pillsbury Co. v. Port of Corpus Christi Auth.*, 66 F.3d 103, 104-05 (5th Cir. 1995).

The Fourth Circuit has also noted that this Court in *Hess*

> never indicated whether the considerations of the state treasury and state sovereignty are generally dispositive if they both suggest the same conclusion, regardless of the conclusion suggested by the other factors. Similarly, although the Court identified protection of state treasuries and respect for state sovereignty as the "prime guide[s]" when the various factors are in conflict, it did not ascribe relative weights to these factors or explain the interrelationship of these two considerations. Finally, the Court explained neither when nor how the other

> "relevant considerations" factor into the central inquiry into the action's effect on the state's treasury and sovereignty.

51 F.3d at 433 (citations omitted). Some courts of appeals have likewise noted that *Hess*'s intended impact on pre-existing circuit case law on arm-of-the-state determinations was by no means clear. See, e.g., *Alkire v. Irving*, 330 F.3d 802, 811 (6th Cir. 2003) ("we now recognize that the question of who pays a damage judgment against an entity as the most important factor in arm-of-the-state analysis, though it is unclear whether it is the only factor or merely the principal one."); *Brotherton v. Cleveland*, 173 F.3d 552, 561 (6th Cir. 1999); *Harter v. Vernon*, 101 F.3d 334, 344-45 (4th Cir. 1996) (Luttig, J., dissenting).

b. The circuits are thus divided as to the proper application of *Hess*'s two-step analysis, and, particularly, the relative weighing of factors under the first, "control" prong. Some, like the First Circuit, have articulated six or seven factors of control, and have required that all must be in accord before arm-of-the-state status will be conferred on an entity. See, e.g., *Wojcik v. Mass. State Lottery Comm'n*, 300 F.3d 92, 99 (1st Cir. 2002); *McGinty v. New York*, 251 F.3d 84, 95-96 (2d Cir. 2001); *Mancuso v. N.Y. State Thruway*, 86 F.3d 289, 293 (2d Cir. 1996). Other courts of appeals have tended to decrease and simplify the number of factual considerations, and not required unanimity among them in order to make a finding of arm-of-the state status. See *Carter v. City of Philadelphia*, 181 F.3d 339, 347 (3d Cir. 1999) (three factors); *Kitchen v. Upshaw*, 286 F.3d 179 (4th Cir. 2002) (three factors); *Eason v. Clark County Sch. Dist.*, 303 F.3d 1137, 1141 (9th Cir. 2002) (five factors); *Sturdevant v. Paulsen*, 218 F.3d 1160, 1166 (10th Cir. 2000) (four factors, although noting that other circuits "have considered additional factors."); *Manders v. Lee*, 285 F.3d 983, 993 (11th Cir. 2002) (four factors).

Yet other courts of appeals have made crystal clear that the factors are a balancing test; none is decisive, and not all need to be satisfied before arm-of-the-state status is confirmed. See *Perez v. Region 20 Educ. Ctr.*, 307 F.3d 318, 327 (5th Cir. 2002) ("No one factor is dispositive, though we have deemed the source of an entity's funding a particularly important factor because a principal goal of the Eleventh Amendment is to protect state treasuries. An entity need not show that all of the factors are satisfied; the factors simply provide guidelines for courts to balance the equities and determine if the suit is really one against the state itself.") (citing *Hudson v. City of New Orleans*, 174 F.3d 677, 682 (5th Cir.1999)).

To some degree, the First Circuit's misapprehension of the *Hess* factors, and their application to PRCCCC, may be seen as arising from this Court's later case law altering the terrain of Eleventh Amendment jurisprudence. While this Petition confines itself to drawing the Court's attention to arm-of-the-state determinations, it nevertheless may require the Court to consider whether *Hess* should be read, as the First Circuit held, App. 30a, to be primarily focused on whether a judgment against an entity will be paid by the state treasury, and thus whether other, more subtle, dignitary interests of states can be discounted or ignored altogether. The question thus becomes whether *Hess*'s indication that potential exposures of state treasuries as the "most salient factor" in arm-of-the-state analysis, 513 U.S. at 48, means that dignitary concerns can be sublimated for single-state special-purpose public corporations.

3. Third, the court below effectively ruled that special-purpose public entities that planned or provided health care services would never qualify as arms-of-the-state because they were engaged in an essentially private sector activity. App. 27a-29a. The court of appeals held that "[nothing] distinguish[es] [PRCCCC] from a private sector hospital . . . .

and nothing about PRCCCC marks it as serving a uniquely governmental function." App. 29a. Although the function a public entity serves is but one component of the *Hess* factors, see 513 U.S. at 44-46 ("whether the entity's functions are readily classifiable as state functions or local or non-governmental functions. . . ."), the First Circuit's analysis, if widely adopted, would categorically disqualify a sweeping array of public health initiatives pursued by states.

a. The decision below appeared to studiously ignore the full range of functions that the Commonwealth legislature invested the PRCCCC. As the organic act for the PRCCCC provided, the entity was to have "the responsibility of framing or executing public policy with regard to the planning, organization, operation and administration of the cardiovascular services to be provided in Puerto Rico." 24 P.R. Laws Ann. § 343b (2000); App. 58-59a. Additionally, the statutory preamble clearly indicated that the PRCCCC was intended "for the purpose of eliminating or mitigating the ailments of cardiovascular patients as well as to promote teaching, study, research and the intellectual development of the health care professionals in this highly specialized field of medicine." Act of June 30, 1986, No. 51, 1986 P.R. Laws 171-72.

The First Circuit's opinion also deliberately minimized the connections between PRCCCC and other components of the Commonwealth government. As reflected in the composition of the PRCCCC Board, the hospital is closely affiliated with the Commonwealth's Department of Health, whose Secretary (a cabinet officer) serves as PRCCCC's Board Chair. See 24 P.R. Laws Ann. § 343c (2000); App. 61a-62a. Likewise, the Executive Director of the Medical Services Administration, primarily charged with the policy and management of the Commonwealth's public health system, also serves. Lastly, the hospital's functions as a training site and research center for

cardiac care are reflected in its connections with the University of Puerto Rico Medical Sciences Campus and Medical School. Each of these entities has been ruled to be an arm-of-the-Commonwealth. See *Pinto v. Universidad de Puerto Rico*, 895 F.2d 18 (1st Cir. 1990); *Rodriguez Diaz v. Sierra Martinez*, 717 F. Supp. 27, 29-31 (D.P.R.1989). In short, to characterize PRCCCC as merely a "private sector hospital," disengaged from a "uniquely governmental function," App. 29a, is to profoundly misunderstand the role and function of state public health entities.

b. State-sponsored teaching and research hospitals nonetheless pose special challenges to the application of this Court's arm-of-the-state jurisprudence. Whether erected and maintained through state university systems, or (as in this case) through independent entities, such clinics or hospitals have drawn widely disparate Eleventh Amendment treatment by the courts of appeals. Especially when a facility is created by state (as opposed to county or municipal) legislation, the tendency has been for federal courts to look at the purposes of the institution, and not to categorically reject (as the First Circuit did here) its qualification for arm-of-the-state status simply because it was engaged in the provision of health care services. See *Laje v. R.E. Thompson Gen. Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982) (hospital was a municipal entity, not a state institution); *Wheeler v. Mental Health & Mental Retardation Auth. of Harris County, Tex.*, 752 F.2d 1063, 1072 (5th Cir. 1985) (same); *Ky. River Comm. Care, Inc. v. Nat'l Labor Relations Bd.*, 193 F.3d 444, 449-50 (6th Cir. 1999) (same); *Crosby v. Hosp. Auth. of Valdosta & Lowndes County*, 93 F.3d 1515, 1522-23 (11th Cir. 1996) (same). Nevertheless, some circuits, like the First in the decision under review here, have required that nearly all of the budget of a clinic or hospital come from state coffers before arm-of-the-state status will be

extended. See *Wheeler*, 752 F.2d at 1072 (a significant amount of "legislatively appropriated funds does not in and of itself render . . . [the center] an arm of the state.").

The First Circuit's opinion, nonetheless, is manifestly in conflict with those decisions of other courts of appeals which have held that medical clinics that are integrated into the state's public health system are endowed with arm-of-the-state status and Eleventh Amendment immunity. See *Darlak v. Bobear*, 814 F.2d 1055, 1059-60 (5th Cir. 1987). Moreover, even where an entity participates in such a health care system as a payment agent or even as an intermediary for purposes of health insurance reimbursements or indemnifications, such an entity has been regarded by some circuits as an arm-of-the-state. See *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1311-12 (11th Cir. 2000) (private third-party administrator of state employee health insurance plan was an arm-of-the-state).

4. Fourth, the First Circuit appeared to impose an impossibly stringent requirement that a state must provide most, if not virtually all, of the operating funds for an entity, if it is to qualify for arm-of-the-state status. Despite finding that PRCCCC had received, at various times in the past decade, nearly two-thirds of its funding from Commonwealth sources, App. 34a-35a, the court of appeals nonetheless ruled that because Puerto Rico's current contribution was (as of FY 2001) no more than 26 percent, such meant that it could not be an arm-of-the-state. Although ostensibly relying on this Court's ruling in *Mt. Healthy*, 429 U.S. at 280, in fact, the First Circuit applied its own pre-*Hess* precedents. App. 36a (citing *Metcalf & Eddy*, 991 F.2d at 941), essentially requiring that the constituent instrument of a public corporation unequivocally specify the state's legal duty to guarantee payment of the entity's debts. See App. 32a-34a.

a. Nothing in this Court's jurisprudence requires, or even suggests, a cramped temporal view in determining an entity's dependence on public funding. If that were the case, an entity could be qualified and disqualified as an arm-of-the-state, depending on what a court regards as the relevant fiscal year or the particular period that an action arises. Indeed, this Court's case law demands just the opposite approach: a test that looks at the entire fiscal history of a special-purpose public corporation, in light of the particular dignity interests that obtain with a state seeking to establish and maintain the entity. Moreover, other circuits have more generally framed the issue as one of whether the public entity is really self-sufficient, or regularly relies upon infusions of state funds in order to operate. See *Lizzi v. Alexander*, 255 F.3d 128, 132 (4th Cir. 2001); but see *Wheeler*, 752 F.2d at 1072 ("a significant amount of "legislatively appropriated funds does not in and of itself render . . . [the center] an arm of the state.").

A more contextual examination of an entity's funding situation and fiscal history is consistent with this Court's observation in *Hess* that only entities that are truly self-sufficient, and so do not rely *at all* on public funding, are undeserving of arm-of-the state status. See 513 U.S. at 50 ("There is no such requirement where the agency is structured, as the Port Authority is, to be self-sustaining.") (citing *Royal Caribbean Corp. v. Puerto Rico Ports Auth.*, 973 F.2d 8, 10-11 (1st Cir. 1992) (Breyer, C.J.)). The First Circuit's stringent requirement of an entity's continuous, contemporaneous, and crushing dependence on state financial resources in order to be eligible for arm-of-the-state status is thus untenable.

b. The First Circuit's exaltation of the financial dependence prong of the *Hess* test, to the exclusion of the wider demands of preserving the state's dignity interests as manifested in its public bodies, also runs contrary to both the majority and

dissenting opinions in *Hess* and in later Eleventh Amendment rulings of this Court. This was made express in *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997), where the Court held that it is improper to convert the arm-of-the-state "inquiry into a formalistic question of ultimate financial liability." Id. at 431. Additionally, this Court noted that "it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant." Id. Decisions by other courts of appeals have confirmed that *Regents* requires courts to examine the potential legal liability of states for the judgments imposed against their entities, and not simply whether state funds will actually pay the judgment. See *Manders*, 285 F.3d at 993; *Shands Teaching Hosp.*, 208 F.3d at 1313.

Just as significantly, the First Circuit's ruling contradicts those of other courts of appeals which have held that even under *Hess*'s second prong, exclusive reliance on impact of a judgment against the entity on the state treasury is improper. Instead, these courts have held that a state's dignity interests can still be implicated even if the state's financial support does not rise to a level consistent with what one might expect to be complete control. See *McGinty*, 251 F.3d at 96; *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 224 (4th Cir. 2001). The result reached by the First Circuit amply illustrates the point enunciated by the Tenth Circuit that "[w]hile the Supreme Court has indicated that [the state treasury's liability for judgments] is the most 'salient' factor, it is also among the most difficult to apply. This . . . highlights the confusion in this area of Eleventh Amendment jurisprudence." *Duke*, 127 F.3d at 980.

5. If left unreviewed, the decision below will represent a further fracture and fragmentation of this Court's arm-of-the-state jurisprudence. A court of appeals opinion which presented

any one of the four pathologies discussed above would merit this Court's attention. That all four are present here, with each reflecting discordant and divergent treatment in circuit precedents, strongly counsels for the Court's intervention here. Such is necessary to clarify and resolve the applicable standards to be used in arm-of-the-state cases, especially those which should implicate substantial deference to a state's legislative and policy decisions in structuring entities entitled to Eleventh Amendment immunity. Particularly when it comes to policy-making, planning, and provision of specialized health care services, and coordinate training and research in those areas, states should be entitled to experiment with creative approaches and strategies in creating special-purpose public entities to meet the public's needs.

This case thus presents a stark example of the disarray which arm-of-the-state jurisprudence finds itself today, substantially transformed in the courts of appeals after this Court's holding in *Hess*. The ruling below will have the effect of disqualifying many Puerto Rico public entities as arms-of-the-state, as well as those bodies similarly situated elsewhere. If widely followed, it will inevitably distort and subvert a gracious and subtle doctrine of respect and deference to the creative political decisions of states in creating useful public entities into a formal and mechanical exercise which exalts form over substance, and which permits federal judges to substitute their judgment for the legitimate political decisions of state legislatures and officials.

CONCLUSION

The Petition ought to be GRANTED.

Respectfully submitted,

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July 23, 2003

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[4] Counsel acknowledges the assistance of Haley A. Sinclair in the preparation of this Petition.

United States Court of Appeals,
First Circuit.

FRESENIUS MEDICAL CARE CARDIOVASCULAR RESOURCES, INC., Plaintiff, Appellee,

v.

PUERTO RICO AND THE CARIBBEAN CARDIOVASCULAR CENTER CORP., Defendant, Appellant.

No. 02-1763.

April 25, 2003

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

United States Court of Appeals,
First Circuit.

FRESENIUS MEDICAL CARE CARDIOVASCULAR RESOURCES, INC., Plaintiff, Appellee,
v.
PUERTO RICO AND THE CARIBBEAN CARDIOVASCULAR CENTER CORP., Defendant, Appellant.

No. 02-1763.

Heard Jan. 9, 2003.
Decided March 6, 2003.

Before LYNCH, Circuit Judge, and COFFIN and CAMPBELL, Senior Circuit Judges.

LYNCH, Circuit Judge.

This case raises the issue of whether the defendant public corporation is an arm of the Commonwealth of Puerto Rico and so entitled to assert immunity under the Eleventh Amendment. It causes us to reshape this circuit's arm-of- the-state test in light of intervening Supreme Court precedent.

Our analysis under the reshaped test leads us to affirm the district court's conclusion that the defendant, Puerto Rico and the Carribean Cardiovascular Center Corp. (PRCCCC), is not an arm of the Commonwealth and so is not entitled to immunity. We also uphold the district court's finding that PRCCCC was adequately served with process. The underlying

lawsuit involves a claim by Fresenius Medical Care Cardiovascular Resources, Inc. (FMC) against PRCCCC for breach of contract, the details of which are not germane to the issues on appeal.

I.

On September 28, 2001, FMC filed a federal court complaint against PRCCCC, asserting diversity jurisdiction under 28 U.S.C. § 1332(a)(1), (d) (2000). It sought over $7,000,000 in damages for breach of contract and of the implied covenant of good faith and fair dealing. It also sought an order requiring specific performance of the contract by PRCCCC and a declaratory judgment that FMC was not in material breach of the agreement.

PRCCCC moved to dismiss the complaint on November 13, 2001. It moved to dismiss on the grounds that PRCCCC is an arm of the state entitled to Eleventh Amendment immunity; that PRCCCC is not a citizen of Puerto Rico for diversity purposes since it is an arm of the state; that FMC lacked standing; and that there was defective service of process. PRCCCC attached to its motion an unauthenticated chart listing the hospital's total revenues and legislative appropriations as well as a statement under penalty of perjury by Jose Soler Zapata, Acting Medical Director of PRCCCC and former Secretary of Health of the Commonwealth of Puerto Rico. FMC, in its opposition, submitted a statement under penalty of perjury by Bill Watson, its executive responsible for dealing with PRCCCC, and objected to the Zapata statement on evidentiary grounds. After receiving two extensions, PRCCCC eventually filed an untimely reply.

The district court denied PRCCCC's motion in an opinion and order dated March 18, 2002. The court applied the multi-factor

arm-of-the-state test set forth in *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority,* 991 F.2d 935, 939-40 (1st Cir.1993). Noting that the most important factor is the entity's relationship to the public fisc, the district court held that this factor weighed against a finding of immunity because the Commonwealth would not be obligated to pay a judgment against PRCCCC and because PRCCCC receives a relatively small share of its funds from the Commonwealth. It also rejected PRCCCC's argument of inadequate service of process.

PRCCCC filed two motions for reconsideration of the district court's March 18 decision. PRCCCC produced new evidence in support of its second motion for reconsideration: statements by Luisa Rivera Lúgaro, the former Executive Director of PRCCCC, and Miguel Bustelo, the Chief Financial Officer of PRCCCC. Bustelo's affidavit attached a new income statement identifying sources of government funding apart from legislative appropriations. Plaintiff again objected to consideration of the evidence. The district court, without providing plaintiff the opportunity to produce more evidence, considered this late-filed information but denied the motion in a six page opinion and order dated May 7, 2002.[1]

On May 21, 2002, PRCCCC filed an interlocutory appeal. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 147, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) (entities claiming to be arms of the state may immediately appeal a district court order denying a claim of Eleventh Amendment immunity under the collateral order doctrine). It also filed a motion in the district court to stay proceedings while its appeal

[1] In its opinion and order denying the second motion for reconsideration, the district court also correctly found that FMC did not, as defendant charges, provide misleading adjusted budget percentages about PRCCCC's operations.

was pending. The district court denied the stay request on June 4, 2002 and denied a motion for reconsideration of that order on July 1, 2002.[2]

PRCCCC finally sought a stay from this court on October 15, 2002, more than four months after the district court denied its stay request. On November 6, 2002, this court denied the request.[3]

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[2] At the same time, PRCCCC failed to meet its obligations to move forward either its appeal or the trial court proceedings. In its appeal of the district court's March 18 and May 7 rulings, PRCCCC missed the deadlines to file counsel's appearance form, its docketing statement, and its brief, *after* those deadlines were extended. In the district court, it disregarded a September 23, 2002 court order requiring PRCCCC to comply with discovery requests that had been pending for over six months.

In its appeal of the district court's Eleventh Amendment finding, PRCCCC again failed to meet its obligations when it submitted its reply brief to this court. The reply brief was late and longer than our rules permit. In addition, the reply brief repeatedly made new and unsupported factual allegations. *See* Fed. R. App. P. 28(a)(7). Plaintiff opposed the filing of the reply brief on the grounds that it was untimely, oversized, and made irrelevant factual accusations. We strike the statement of facts and new factual references in the reply brief but have considered the legal arguments made.

[3] This court's order denying the stay said:

> A request for a stay essentially invokes the equitable powers of this court. Here, the conduct of [PRCCCC] evidences a pattern of causing delay in this litigation, both in this court and the district court, including missing filing deadlines after those deadlines were extended. Accordingly, we think the

(continued...)

II.

A. *Standards for Arm-of-the-State Analysis*

We review de novo the conclusion that PRCCCC is not entitled to Eleventh Amendment immunity. *Arecibo Cmty. Health Care, Inc. v. Puerto Rico,* 270 F.3d 17, 22 (1st Cir.2001).

The question of whether PRCCCC is an arm of the Commonwealth and entitled to share its Eleventh Amendment immunity is a question of federal law. *Regents of the Univ. of*

[3](...continued)
Hospital is in a poor position to claim that it will suffer injury if the stay is not granted. We therefore *deny* the motion for a stay.

We will, however, expedite this appeal.... Should the trial date in the district court arrive before this court has decided the appeal, then the Hospital may reapply for a stay.

A month later, PRCCCC filed an "urgent motion for reconsideration" of this court's denial of the stay request, claiming that the trial date had in fact arrived before this court had decided the appeal. PRCCCC's claim was false. PRCCCC suggested that the parties would engage in arbitration at the district court's behest, before the appeal was decided, and that this was the equivalent of a trial date. In fact, no steps had been taken by either side to initiate arbitration. No date for arbitration had been set, and an arbitrator had not been contacted. Because nothing had changed since the issuance of the November 6 order, this court denied the motion for reconsideration on December 19, 2002.

Cal. v. Doe, 519 U.S. 425, 429 n. 5, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997). The Commonwealth of Puerto Rico is treated as a state for Eleventh Amendment purposes. *P.R. Ports Auth. v. M/V Manhattan Prince,* 897 F.2d 1, 9 (1st Cir.1990). Here the Commonwealth itself is not a party nor has it sought to express its views in this litigation as a party or amicus; PRCCCC is the party and is attempting to cloak itself in the Commonwealth's Eleventh Amendment immunity under the theory that it is an arm of the state. PRCCCC, the entity asserting Eleventh Amendment immunity, bears the burden of showing it is an arm of the state. *Wojcik v. Mass. State Lottery Comm'n,* 300 F.3d 92, 99 (1st Cir.2002).

The arm-of-the-state doctrine arises in connection with at least three types of entities.[4] The first is a political subdivision of the state, such as a city or county. Political subdivisions are not entitled to Eleventh Amendment immunity. *See, e.g., Bd. of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 369, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (citing *Lincoln County v. Luning,* 133 U.S. 529, 530-31, 10 S.Ct. 363, 33 L.Ed. 766 (1890)); *see also Moor v. County of Alameda,* 411 U.S. 693, 717-721, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973) (political subdivision not arm of the state for diversity jurisdiction purposes). The second entity is established by two (or more) states by compact and approved by Congress. The third, the type at issue here, involves a special-purpose public corporation established at the behest of a state. Multi-state compact entities

[4] PRCCCC does not argue that it is simply acting as an agent of the state, such as a private corporation acting under contract as a fiscal intermediary for a health insurance program for state employees. *See Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.,* 208 F.3d 1308 (11th Cir.2000). Nor would the record support any such argument.

and special-purpose public corporations established by a state sometimes share the state's Eleventh Amendment immunity. The arm of the state analytical doctrine has moved freely amongst these three categories, applying common principles.

The Supreme Court's modern arm-of-the-state jurisprudence starts with *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), which rejected the school board's claim that it was an arm of the state and not a political subdivision. In *Mt. Healthy,* the Supreme Court looked in part to state law to consider the "nature of the entity created by law." *Id.* at 280, 97 S.Ct. 568. It concluded that state law rendered the board more like a county or city, and thus not an arm of the state. The court considered a balance of factors: The board obtained guidance and extensive monies from the state, but that was offset by the board's revenue-raising power, including its power to issue bonds and levy taxes. *Id.* It was unclear whether "the Court was using state law as an indication of the state's intention with respect to school bonds or as a structural feature that the Court would look to regardless of the state's intention." *Morris v. Wash. Metro. Area Transit Auth.,* 781 F.2d 218, 223 (D.C.Cir.1986). This court, as discussed below, has chosen to ask the question in terms of how the state structured its relationship to the entity.

The *Mt. Healthy* decision was followed by *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979), which, by contrast, involved a bi-state agency, and thus raised different concerns, including the interests of the federal government under the Compact Clause. There the court held:

> [S]ome agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical

consequences as a judgment against the State itself.

Id. at 400-01, 99 S.Ct. 1171. *Lake Country* also considered several facts as pertinent to the analysis.[5]

That was the state of the doctrine in 1993, when this court

[5] The Court in *Lake Country* identified the following facts as germane to the arm-of-the-state status of the Tahoe Regional Planning Agency (TRPA):

> 1. the designation in the interstate compact of the TRPA as a "separate legal entity" and a "political subdivision";
>
> 2. the power that resided in counties to appoint six of the ten governing members of the TRPA whereas the states appointed only four members;
>
> 3. the funding of the TRPA exclusively by the counties;
>
> 4. the express pronouncement in the compact that obligations of the TRPA were not binding on either state;
>
> 5. the function of the TRPA, which was to regulate land use; and
>
> 6. the failure of the states to preserve veto power over rules promulgated by the TRPA.

See 440 U.S. at 401-02, 99 S.Ct. 1171. Thus, the analysis considered (a) how the entity is characterized under state law; (b) the level of control exercised by the state; (c) the entity's relationship to the public treasury (both the relative size of its government appropriation and whether the government is legally liable for the entity's debts); and (d) whether the entity performs a state function. *See generally* A.E. Rogers, Note, *Clothing State Governmental Entities With Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 Colum. L.Rev. 1243 (1992) (criticizing the Court's continuing use of a multi-factor approach).

decided *Metcalf & Eddy,* 991 F.2d at 939-40. For the past decade the courts of this circuit, under *Metcalf & Eddy,* have assessed an entity's arm-of-the-state status by focusing on whether the structure established by the state reveals that the agency is an arm of the state; if the structure does not resolve the question, then the primary focus is on whether the action is in essence one for recovery from the state. Because answers are not always clear, we have encouraged the use of a non-exclusive list of factors, and identified at least seven areas of inquiry.[6] These multi-factor tests, as we noted in *Neo Gen Screening, Inc. v. New England Newborn Screening Program,* 187 F.3d 24, 27 (1st Cir.1999), "are not easy to apply." Still, *Metcalf & Eddy* presciently predicted the ways in which the Supreme Court would view the issue.

[6] "These areas, each of which can be mined for information that might clarify the institution's structure and function, include:

> (1) whether the agency has the funding power to enable it to satisfy judgments without direct state participation or guarantees;
>
> (2) whether the agency's function is governmental or proprietary;
>
> (3) whether the agency is separately incorporated;
>
> (4) whether the state exerts control over the agency, and if so, to what extent;
>
> (5) whether the agency has the power to sue, be sued, and enter contracts in its own name and right;
>
> (6) whether the agency's property is subject to state taxation; and
>
> (7) whether the state has immunized itself from responsibility for the agency's acts or omissions."

Id. at 939-940.

In the intervening decade since *Metcalf & Eddy* there have been two Supreme Court decisions addressing arm-of-the-state issues: *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 33, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994), involving a bi-state entity, which updated and clarified the arm-of-the- state doctrine; and *Auer v. Robbins,* 519 U.S. 452, 456 n. 1, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), which briefly applied *Hess* to an intra-state entity. Additionally, in that time, a number of important Supreme Court decisions have reshaped Eleventh Amendment doctrine. The question is raised then as to whether those opinions cause us to reshape the *Metcalf & Eddy* test.

We start with the larger Eleventh Amendment doctrine. Several points, at least, are informative to our analysis. The first is that the Supreme Court has said that it is not just the state's interest in its public treasury which is at stake in the assertion of Eleventh Amendment immunity. The state also has a "dignity" interest as a sovereign in not being haled into federal court. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 122 S.Ct. 1864, 1874-75, 152 L.Ed.2d 962 (2002). These twin goals of the Eleventh Amendment--protection of the state's treasury and of its dignitary interests--explicitly govern the arm-of-the-state analysis. *Hess,* 513 U.S. at 39-41, 115 S.Ct. 394.

The changes in Eleventh Amendment doctrine have created different *consequences* for a finding that an entity partakes of Eleventh Amendment immunity as an arm of the state. The Eleventh Amendment has always acted to restrict the jurisdiction of the federal courts to entertain claims against the state when the underlying source of federal jurisdiction is diversity jurisdiction. *See Univ. of R.I. v. A.W. Chesterton Co.*, 2 F.3d 1200, 1202- 03 (1st Cir.1993). The Amendment also restricts the jurisdiction of the federal courts to hear private claims based on federal causes of action created by the

Congress, *see Edelman v. Jordan,* 415 U.S. 651, 662-64, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), subject to the *Ex Parte Young* exception for injunctions against state officers, *Ex Parte Young,* 209 U.S. 123, 159, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Importantly, the Court has recently held that the Amendment's inherent notions of state sovereign immunity impose restrictions on the power of Congress, acting under certain Article I powers, to create privately enforced federal causes of action against the states. *Seminole Tribe v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). Where the Eleventh Amendment bars jurisdiction over a claim in federal court, the states may decline on sovereign immunity grounds to entertain such an action. *Alden v. Maine,* 527 U.S. 706, 731-32, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999).

While this case is a diversity action for breach of contract, the criteria for rules about what is an arm of the state have not varied with whether the basis for federal jurisdiction is diversity or federal question. Accordingly, any arm-of-the-state conclusion here has implications for the enforceability of federal laws enacted under Article I in suits by private persons against PRCCCC.

Thus, where an entity claims to share a state's sovereignty and the state has not clearly demarcated the entity as sharing its sovereignty, there is great reason for caution. It would be every bit as much an affront to the state's dignity and fiscal interests were a federal court to find erroneously that an entity was an arm of the state, when the state did not structure the entity to share its sovereignty. The consequences of an arm-of-the-state finding are considerable. For example, where a state consents to suit in its own courts, such an arm-of-the-state finding may pose a threat to the state treasury, even if the state has not structured the entity so as to put its treasury at risk. In an era when many states face budget crises and impose cutbacks on

recognized state agencies, yet another claimant on the treasury may not be welcomed.

Not all entities created by states are meant to share state sovereignty. Some entities may be part of an effort at privatization, representing an assessment by the state that the private sector may perform a function better than the state. *Cf. Richardson v. McKnight,* 521 U.S. 399, 405-07, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997) (discussing advantages of private sector entities performing government functions and role of private contractors in prison administration). Some entities may be meant to be commercial enterprises, viable and competitive in the marketplace in which they operate. Such enterprises may need incentives to encourage others to contract with them, such as the incentives of application of usual legal standards between private contracting parties. The dollar cap on recovery found in many state sovereign immunity statutes would be a powerful disincentive to a private party to contract with an entity, unless the private party first obtained a waiver of immunity from the entity. *See generally Defendini Collazo v. Commonwealth of P.R.,* 134 D.P.R. 28 (1993), *available at* 1993 WL 839857 (discussing limited waivers of sovereign immunity under Puerto Rico law). In Puerto Rico, a breach of contract action against the Commonwealth is capped at $75,000. 32 P.R. Laws Ann. § 3077(c) (2001).

A conclusion that the entity is beyond the control of privately enforced Article I legislation enacted by the Congress may also be undesirable to a state. A state may not have intended, for example, that the employees of the entity be unable to privately enforce the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2000), *see Alden,* 527 U.S. at 712, 119 S.Ct. 2240 (dismissing FLSA lawsuit by state employees on grounds that Congress, acting pursuant to its Article I powers, could not abrogate the sovereign immunity of states in state court); or Title I of the

Americans with Disabilities Act, 42 U.S.C. §§ 12111-12117 (2000), *see Garrett,* 531 U.S. at 360, 121 S.Ct. 955 (holding that suits by state employees to recover money damages for a state's failure to comply with the provisions of Title I of the ADA are barred by the Eleventh Amendment); or the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, *see Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 82-83, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (holding that ADEA's purported abrogation of the states' sovereign immunity is invalid because ADEA is not "appropriate legislation" under section five of the Fourteenth Amendment); or provisions of the Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654, *see Laro v. New Hampshire,* 259 F.3d 1, 4 (1st Cir.2001) (invalidating on Eleventh Amendment grounds a private cause of action for money damages against the state under the personal medical leave provision of the FMLA). A state could adjudge that those effects may be unwanted disincentives to people who might otherwise seek employment with the entity, or that it is unwise to differentiate the entity's employees from those in the private sector. In sum, states set up entities for many reasons. An erroneous arm-of-the-state decision may frustrate, not advance, a state's dignity and its interests.

Against that context of the serious consequences on both sides of this issue, it is the developments in the arm-of-the-state case law from the Supreme Court which bind us here. The most recent full discussion of the doctrine is in *Hess. Hess,* like *Lake Country* before it, involves an entity created by two states under the Compact Clause of the Constitution. A closely divided court in *Hess* held that the Port Authority Trans-Hudson Corporation was not an arm of the state. As noted above, the *Hess* analysis explicitly recognizes the Eleventh Amendment's twin interests: protection of the fisc and the dignity of the states. 513 U.S. at 39-40, 47, 115 S.Ct. 394.

As to bi-state Compact Clause entities, the *Hess* court continued the general approach taken in *Lake Country:*

> We would presume the Compact Clause agency does not qualify for Eleventh Amendment immunity "unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the states themselves and that Congress concurred in that purpose."

Id. at 43-44, 115 S.Ct. 394 (quoting *Lake Country,* 440 U.S. at 401, 99 S.Ct. 1171). Putting aside the question of presumption, *Hess* requires a two-step analysis. *Accord Harter v. Vernon,* 101 F.3d 334, 337 (4th Cir.1996). The first step of the analysis concerns how the state has structured the entity. This step, we think, pays deference to the state's dignitary interest in extending or withholding Eleventh Amendment immunity from an entity. After all, a state may easily make clear by statute its view that an entity is to share the state's immunity. Where the state has not made a clear statement, its dignity interests are nonetheless protected by an examination of the structure the state has chosen to establish. In evaluating whether the state had structured an agency to be an arm of the state, *Hess* looked at "various indicators of immunity or the absence thereof."[7] 513

[7] Among the indicators *Hess* considered were:

1. extent of state control including through the appointment of board members and the state's power to veto board actions or enlarge the entity's responsibilities;

2. how the enabling and implementing legislation characterized the entity and how the state courts have viewed the entity;

3. whether the entity's functions are readily classifiable as state functions or local or

(continued...)

U.S. at 44, 115 S.Ct. 394. *Hess* addressed the two questions of whether the state meant to confer immunity and of whether Congress had ratified that conferral. An affirmative answer to the first question may not be dispositive even where creation of the entity does not involve a question of congressional ratification. The ultimate issue is still a federal question for the courts to decide.

If the structural indicators point in different directions, then the second stage of analysis comes into play. At this stage, the vulnerability of the state's purse is the most salient factor in the Eleventh Amendment determination.[8] Where it is clear that the state treasury is not at risk, then the control exercised by the state over the entity does not entitle the entity to Eleventh Amendment immunity. *See id.* at 47-49, 115 S.Ct. 394.[9]

[7](...continued)
non-governmental functions; and

4. whether the state bore legal liability for the entity's debts.

See 513 U.S. at 44-46, 115 S.Ct. 394.

[8] This *Hess* vulnerability inquiry includes examination of these, among other, factors: whether the state laws impose an obligation on the state to be responsible for payment of judgments against the entity (on this point federal courts are not free to assume that a state will voluntarily assume the payment of the entity's debts if the entity is in need); other sources of revenue for the entity; and whether the agency is so structured that, as a practical matter, the state anticipated budget shortfalls that would render the entity constantly dependent on the state. *Id.* at 49-50, 115 S.Ct. 394.

[9] Although the dissent in *Hess* would reach a different conclusion on the facts there, it agrees that the key initial question is (continued...)

In the aftermath of *Hess,* the circuits almost uniformly find that, when there is an ambiguity about the direction in which the structural analysis points, the potential payment from the state treasury is the most critical factor in determining whether an entity is operating as an arm of the state. *See* 17A J.W. Moore et al., *Moore's Federal Practice* § 123.23(4)(b), at 123-60 & n. 51 (3d ed.2000) [hereinafter *Moore's*] (collecting cases).

The question for the lower federal courts becomes what parts of *Hess* govern the analysis of an intra-state entity such as PRCCCC. Compact Clause entities by their nature involve different federalism concerns than intra-state entities. Several objections might be made to applying *Hess* here. The presumption announced in *Hess* may be limited to multi-state entities. It might also be thought that the two-step *Hess* analysis applies only to multi- state Compact Clause entities, and so not to a public corporation formed by the Commonwealth alone. Or it might be thought, more generally, that *Hess* is inconsistent

[9](...continued)
whether "the State has structured the entity in the expectation that immunity will inhere." *Id.* at 58, 115 S.Ct. 394 (O'Connor, J., dissenting). The dissent also agrees that if the entity's liabilities are funded by the taxpayers' dollars, then there is Eleventh Amendment immunity. *Id.* at 60-61, 115 S.Ct. 394. The *Hess* dissent did not agree that the converse was true: that if the state treasury was not directly implicated, then there would be no immunity. The dissent would then ask whether the state "possesses sufficient *control* over an entity performing governmental functions that the entity may properly be called an extension of the State itself." *Id.* at 61, 115 S.Ct. 394. If the lines of oversight are clear and substantial--for example, if the state appoints and removes an entity's governing personnel and retains veto or approval power over an entity's undertakings"--then, on the dissent's reasoning, the entity should be deemed an arm of the state for Eleventh Amendment purposes. *Id.*

with later Eleventh Amendment case law, and so should not be taken as establishing doctrine controlling now.

Hess itself noted there was reason to treat Compact Clause entities somewhat differently. 513 U.S. at 42, 115 S.Ct. 394 ("There is good reason not to amalgamate Compact Clause entities with agencies of one of the United States for Eleventh Amendment purposes.") (internal quotation omitted); *accord Hadley v. N. Ark. Cmty. Technical Coll.*, 76 F.3d 1437, 1439 (8th Cir.1996) (interpreting *Hess*). "As part of the federal plan prescribed by the Constitution, the States agreed to the power sharing, coordination, and unified action that typify Compact Clause creations.... [T]he federal tribunal cannot be regarded as alien in this cooperative, tri- governmental arrangement." *Hess,* 513 U.S. at 41-42, 115 S.Ct. 394. Here, by contrast, the federal government is not a party to the arrangement. As a result, we think the presumption announced in *Hess*--a presumption against an entity being an arm of the state--applies only to Compact Clause entities, and the logic of it does not extend to the two other categories of cases.

We conclude, however, that the two-step analysis of *Hess* is not limited to Compact Clause entities. Several reasons support this conclusion. First, *Hess* is founded on the twin reasons underlying the Eleventh Amendment, reasons common to all categories of cases. Further, the *Hess* court cited *Metcalf & Eddy,* which did not involve a multi-state Compact Clause entity, among cases supporting the point that "the vulnerability of the State's purse [is] the most salient factor in Eleventh Amendment determinations." *Hess,* 513 U.S. at 48, 115 S.Ct. 394. *Hess* also cited cases from four other circuits adhering to that principle when the entities involved included intra- state authorities, as well as political subdivisions and bi-state entities. *Id.* at 48-49, 115 S.Ct. 394. There is no indication the court intended to differentiate in the application of its major tests

depending on the nature of the entity. Thus, *Metcalf & Eddy* foreshadowed *Hess*'s determination that when there is ambiguity from the structure about whether an entity is an arm of the state, the primary focus is on the risk to the state treasury.

Next, the circuits have also viewed *Hess* as applying to political subdivision and intra-state corporation cases. *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir.1996) ("Although *Hess* involved a bi-state entity, we nevertheless believe that it is the proper starting place for our Eleventh Amendment inquiry in this case," involving an intra-state entity); *see, e.g., Harter,* 101 F.3d at 337-40 (applying *Hess* to determine whether an entity should be characterized as a political subdivision or a state agency).

Finally, *Auer v. Robbins,* a case involving an intra-state entity, the Board of Police Commissioners, supports our reading that the two-step analysis applies beyond Compact Clause entities. In a footnote, the Court held the Board was not an arm of the state because the state was not responsible for the Board's financial liabilities and the only form of state control was the governor's power to appoint four of five Board members. 519 U.S. at 456 n. 1, 117 S.Ct. 905. The Court did not cite to its earlier precedent, such as *Mt. Healthy,* but rather to its bi-state compact cases, *Hess* and *Lake Country.* [10]

[10] In *Regents of the University of California v. Doe,* the Court said generally:

> Of course, the question of whether a money judgment against a state instrumentality or official would be enforceable against the State is of considerable importance to any evaluation of the relationship between the State and the entity being sued.

(continued...)

As to the more general concern, some have questioned *Hess*'s viability in light of *Seminole* and its aftermath. *See Thiel v. State Bar,* 94 F.3d 399, 401-03 (7th Cir.1996) (viewing *Hess* as implicitly limited by *Seminole*). *Hess*'s emphasis on protection of the state fisc as a primary component of an arm-of-the-state analysis has been criticized as not entirely consistent with the broader Eleventh Amendment interests established by other and later cases. *See* C.M. Vazquez, *What Is Eleventh Amendment Immunity?,* 106 Yale L.J. 1683, 1731-32 (1997); *see also Thiel,* 94 F.3d at 401-02.

One response would be that *Hess* was concerned with an entirely different problem. *Seminole* and its progeny are addressed to what protection is given the state by the Eleventh Amendment. *Hess* is concerned with who is entitled to share that protection. When the state has not made it clear through structure that an entity is to share its immunity, there is reason not to reach a result inconsistent with what the state has apparently hoped to effectuate (that is, an independent entity) unless there is a risk to the state fisc.

Another response would be that *Seminole* and its progeny affirm the longstanding view, operationalized in *Hess,* that the Eleventh Amendment exists to protect the fiscal and dignity interests of the state. *Seminole,* 517 U.S. at 58, 116 S.Ct. 1114. The first prong of *Hess* pays considerable deference to the dignity interests of the state, focusing on both explicit and implicit indications that the state sought to cloak an entity in its Eleventh Amendment immunity.

Finally, even were the criticism to have force, *Hess* binds us and has not been overruled. To the contrary, it has been

[10](...continued)
519 U.S. at 430, 117 S.Ct. 900.

consistently cited by the Court.[11] We must follow it until the Supreme Court decides otherwise. *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

Accordingly, in the aftermath of *Hess, Auer* and *Regents of the University of California*, we think the *Hess* analysis governs and has refined the *Metcalf & Eddy* analysis, which is consistent with *Hess*. We view *Hess* as involving two key questions, with many factors instructive on each:

1. Has the state clearly structured the entity to share its sovereignty? This evaluation is undertaken[12] in light

[11] *E.g., Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001); *Alden*, 527 U.S. at 746, 119 S.Ct. 2240; *Seminole*, 517 U.S. at 58, 116 S.Ct. 1114.

[12] Lest our focus on the structure created by the state be misunderstood, whether an entity is entitled to partake of a state's Eleventh Amendment immunity is a question of federal law, not state law:

> Ultimately, of course, the question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State, and therefore "one of the United States" within the meaning of the Eleventh Amendment, is a question of federal law. But that federal question can be answered only after considering the provisions of state law that define the agency's character.

Regents of the Univ. of Cal., 519 U.S. at 429 n. 5, 117 S.Ct. 900. The

(continued...)

of the different factors described in *Hess, Lake Country* and *Metcalf & Eddy.*

2. If the factors assessed in analyzing the structure point in different directions, then the dispositive question concerns the risk that the damages will be paid from the public treasury. This is the rule of *Metcalf & Eddy,* valid today as well. This analysis focuses on whether the state has legally or practically obligated itself to pay the entity's indebtedness.

The control asserted by the state is an important guide to the initial inquiry. But where the evidence is that the state did not structure the entity to put the state treasury at risk of paying the judgment, then the fact that the state appoints the majority of the governing board of the agency does not itself lead to the conclusion that the entity is an arm of the state.

B. *Application of Standards*

We now apply these standards to the facts of this case. There are no factual findings of disputed facts by the district court, as the issue was decided under Rules 56 and 12(b)(6).[13] PRCCCC

[12](...continued)
Supreme Court has adverted to state law, but has not defined what role it is to play. *See, e.g., Mt. Healthy,* 429 U.S. at 280, 97 S.Ct. 568. In *Hess* itself the majority declined to adopt the state court's characterization of the agency. *See* 513 U.S. at 45, 115 S.Ct. 394 (holding that the Port Authority does not enjoy Eleventh Amendment immunity despite the fact that "[s]tate courts ... repeatedly have typed the Port Authority an agency of the States rather than a municipal unit or local district").

[13] We treat the Fed.R.Civ.P. 12(b)(6) motion raising PRCCCC's Eleventh Amendment defense as a motion for summary (continued...)

does not claim that there were disputed facts requiring resolution by the trial court. The parties do draw different conclusions from the undisputed financial records of PRCCCC. We consider the facts from admissible evidence that are germane to Eleventh Amendment immunity in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. *Wojcik*, 300 F.3d at 96.

1. *Structuring of PRCCCC*

a. *The Enabling Act*

The enabling act that created PRCCCC, 24 P.R. Laws Ann. §§ 343-343k (2000), does not by its terms structure PRCCCC to be an arm of the state. In fact, it suggests exactly the opposite. The act creates an "entity which is independent and separate from any other agency or instrumentality of the Government of the Commonwealth of Puerto Rico." *Id.* § 343a. Moreover, PRCCCC is explicitly empowered to enter into contracts with the state, specifically the Commonwealth's Department of Health, the University of Puerto Rico, and "any other bodies or instrumentalities of the Commonwealth of Puerto Rico."[14] *Id.* § 434b(n). Further, the act provides that PRCCCC may

[13](...continued)
judgment, since both parties presented and the court did not exclude evidence outside the pleadings. Fed.R.Civ.P. 12(b).

[14] In PRCCCC's favor is that it has been exempted from all taxes and fees collected by the government of Puerto Rico and its political subdivisions. *Id.* § 343e. By like token, that very language indicates it is not a political subdivision. In reference to PRCCCC's tax exempt status, FMC executive Watson observes that many of the private hospitals he has dealt with are also exempt from local taxes and duties.

"borrow" money from the Commonwealth, *id.* § 343b(g), and that the Commonwealth will charge it rent for use of its building, which "shall help to amortize the debt for a period of thirty (30) years," *id.* § 343g. The Board is authorized to create a budget, which it must submit to the legislature, but the budget is required to stay "within the limits of [PRCCCC's] estimated income so as to keep from incurring shortfalls." *Id.* § 343h. Importantly, the act does not say the treasury of the Commonwealth will pay for those shortfalls.[15]

Nonetheless, in PRCCCC's favor, the act does not contain language declaring that the Commonwealth is *not* responsible for PRCCCC's debt, as was true of the statutory schemes in *Metcalf & Eddy, see* 991 F.2d at 940, and *Royal Caribbean Corp. v. Puerto Rico Ports Authority,* 973 F.2d 8, 11 (1st Cir.1992). In that sense, this is a closer case.

b. *Other State Statutes*

PRCCCC relies on statutes outside its own enabling act to argue that it is an arm of the state. It points to the definition of public funds set forth in 33 P.R. Laws Ann. § 3022(11), (14), which provide:

> (11) Commonwealth of Puerto Rico--Comprises its municipalities, agencies, public corporations, political subdivisions and other dependencies or instrumentalities.

[15] Interestingly, PRCCCC's own evidence showed that one of the purposes of creating the public corporation was that public funds allocated to the hospital "could be insulated from the budgetary constraints the [Commonwealth's] Health Department always had." Another purpose was to serve as "justification to 'privatize' the health system." These are also indicia that the Commonwealth wanted PRCCCC to be at arm's length, not to be an arm of the state.

(14) Public funds or public treasury--Means all bonds or liabilities and evidences of indebtedness and all moneys belonging to the Government of the Commonwealth of Puerto Rico, the municipalities, agencies, public, municipal and state corporations, political subdivisions and other dependencies, and all moneys, securities, bonds and evidences of indebtedness received and kept by officials or employees of the aforementioned entities, in their official character.

We reject for four reasons the contention that this definition of public funds is a statement that all "public corporations" established by Puerto Rico are arms of the state. First, the definitions are explicitly limited to the subtitle in which they appear, a part of the Penal Code of Puerto Rico. *See id.* § 3022. Second, when Puerto Rico has chosen to make an entity an arm of the state, it has used other language. For example, the Medical Services Administration (MSA), another health care entity created by the Commonwealth,[16] was "created as an instrumentality of the Government of the Commonwealth of Puerto Rico, attached to the Commonwealth Department of Health ... under the direction and supervision of the Secretary of Health." 24 P.R. Laws Ann. § 342b; *see Rodriguez Diaz v. Sierra Martinez,* 717 F.Supp. 27, 29-31 (D.P.R.1989). Third, it is a maxim of statutory construction that the more specific statute, here PRCCCC's enabling act, governs over the more

[16] PRCCCC witness Zapata asserts claims that the structure of the PRCCCC is "similar, if not identical" to that of the public medical center known (in English) as the Medical Services Administration (MSA). This is untrue, as discussed above. Furthermore, unlike the PRCCCC enabling legislation, *see* 24 P.R. Laws Ann. §§ 343-343k, the M.S.A. enabling legislation provides that civil litigants against the M.S.A. are subject to the cap on recovery established under the Commonwealth's state sovereign immunity, 24 P.R. Laws Ann. § 343g.

general, such as the definitions in § 3022. *See In re Weinstein,* 272 F.3d 39, 43 (1st Cir.2001). Fourth, such a construction would be inconsistent with a number of our cases finding various public authorities and corporations created by Puerto Rico not to be arms of the state. *See, e.g., Metcalf & Eddy,* 991 F.2d 935; *Royal Caribbean Corp.,* 973 F.2d 8 (Breyer, C.J.).

c. *State Court Decisions*

Apart from the statutory schemes, we consider how the state courts have treated PRCCCC. The Supreme Court has found state court decisions a useful resource. *See Hess,* 513 U.S. at 45, 115 S.Ct. 394; *Moor,* 411 U.S. at 720-721, 93 S.Ct. 1785. PRCCCC has not provided us with a single opinion from a court of Puerto Rico holding that PRCCCC is part of the government of Puerto Rico, or, for that matter, that the Commonwealth will stand behind PRCCCC's debt.[17] It is PRCCCC's burden to do so. *See Wojcik,* 300 F.3d at 99; *Gragg v. Ky. Cabinet for Workforce Dev.,* 289 F.3d 958, 963 (6th Cir.2002); *Skelton v. Camp,* 234 F.3d 292, 297 (5th Cir.2000).

PRCCCC points to the Penal Code, stating that PRCCCC employees are considered public employees under the Penal Code of Puerto Rico. The Penal Code's definition of a public employee, which is expressly limited to the subtitle in which it appears, *see* 33 P.R. Laws Ann. § 3022, includes persons working for municipal and local government bodies and other entities that do not enjoy Eleventh Amendment immunity, *see id.* § 3022(16). Meanwhile, other statutory definitions of public employee seem to exclude PRCCCC employees. *See, e.g.,* 33

[17] PRCCCC refers to a 1987 opinion by the Attorney General; we do not read that opinion as supporting PRCCCC even assuming, dubitante, that it has some authoritative value.

P.R. Laws Ann. § 729c(b) (chapter on compensation and benefits of government personnel adopts definition of employee that specifically excludes "the officials and employees of the public corporations and of the University of Puerto Rico").

d. *Functions of PRCCCC*

PRCCCC contends that its functions are those of a government. If true, that would assist its structural argument. PRCCCC points to no judicial authority to support its proposition. Instead, it offers three arguments.

First, Zapata contends that PRCCCC is an essential component of the Commonwealth's strategy to comply with its obligation, under the Constitution of Puerto Rico, Article II, Section 20, to provide health care to indigent residents. It appears Section 20 is not binding.[18] The Constitution of Puerto Rico had to be approved by the U.S. Congress before going into effect. *Figueroa v. People of P.R.*, 232 F.2d 615, 620 (1st Cir.1956). Congress conditioned its approval of the Puerto Rico Constitution partly on deletion of Article II, Section 20. *See* Pub.L. No. 82- 447, 66 Stat. 327, 327 (1952). Furthermore, Article II, Section 20 appears to have been intended as an aspirational statement, modeled on language in the Universal Declaration of Human Rights, rather than as a basis for legal obligations. The Section enumerates a list of human rights including the right to work, the right to an adequate standard of living, and the right to medical care; it then states, "The rights

[18] PRCCCC has not provided any authority to support a claim that Section 20 is binding. Even if Section 20 were binding, that would not be dispositive. The Commonwealth could choose to meet an obligation by contracting with a private corporation or by other means.

set forth in this section ... require, *for their full effectiveness,* sufficient resources and an agricultural and industrial development *not yet attained by the Puerto Rican community.*" (emphasis added).

Second, PRCCCC's enabling legislation says that it will be responsible for public policy relating to the provision of cardiovascular services in Puerto Rico. 24 P.R. Laws Ann. § 343b. PRCCCC presents no evidence indicating that it has helped set policies applicable to other facilities in Puerto Rico. It acknowledges, moreover, that since the Commonwealth carried out a major health reform in 1993, PRCCCC has competed with private hospitals for legislative appropriations and other public funds allocated for cardiovascular surgery.[19] This reform presumably diminished any policymaking function of PRCCCC.

Third, Zapata observes that PRCCCC's mission includes training medical students, interns, and residents from the University of Puerto Rico (a public university). But many hospitals unaffiliated with state governments (or the Commonwealth) employ (and train) interns and residents from state medical schools.

Medical care in Puerto Rico, as in the United States, is provided by a combination of private and public sector entities. Even medical care for the poor is a responsibility often imposed on private hospitals, through free care pools, Medicaid, and other devices. The difficulty of containing costs for these services may be exactly why Puerto Rico has chosen in PRCCCC's enabling act not to make its treasury accountable for PRCCCC's debts. That PRCCCC receives Medicaid funding

[19] Further, Watson notes that PRCCCC functions with respect to its vendors like a private, rather than a government, hospital.

does not distinguish it from a private sector hospital, either not-for-profit or for-profit. A mosaic of medical providers serves the poor and the uninsured, and nothing about PRCCCC marks it as serving a uniquely governmental function.

e. *Control by the State*

PRCCCC also argues that it is subject to a fair degree of control by the Commonwealth. Under the enabling act, the Board is composed of seven members, three of whom are ex officio members and are high-ranking state officials. 24 P.R. Laws Ann. § 343c. The governor appoints the remaining four members to four-year terms. The Secretary of Health of Puerto Rico is chairman of the Board. The votes of four members are needed for action; thus the ex officio members presumably vote.

The governor's appointment power over the board is not enough in itself to establish that PRCCCC is an arm of the state. *See Auer,* 519 U.S. at 456 n. 1, 117 S.Ct. 905. The statute itself does not give the governor power to remove Board members, and it is unclear where such power resides.[20] Nor does the statute give the Commonwealth veto power over the decisions of the Board, a key element of control.

In her statement, Lúgaro asserts that the governor intervenes periodically in PRCCCC management and personnel issues. She asserts that the Commonwealth's Comptroller audits PRCCCC. She also says that the Executive Director and other

[20] PRCCCC, which bears the burden of proof, offers only inadmissible hearsay evidence on this point. *See Vazquez v. Lopez-Rosario,* 134 F.3d 28, 33 (1st Cir.1998) ("Evidence that is inadmissible at trial, such as inadmissible hearsay, may not be considered on summary judgment.").

key PRCCCC personnel have to file annual reports with the Government Ethics Office. These are indicia of control, but hardly determinative in view of the statutory structure.[21]

We cannot say the indicia all point in the direction of PRCCCC being an arm of the state and so reach the second stage of the analysis.

2. *Would the Commonwealth's Treasury Be Obligated to Pay a Judgment Against PRCCCC?*

Our next inquiry is whether any judgment in this action would be paid by the Commonwealth's treasury. As *Hess* explained, "If the expenditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is 'No'--both legally and practically--then the Eleventh Amendment's core concern is not implicated." 513 U.S. at 51, 115 S.Ct. 394. Thus we examine two areas: what is said by state law on the topic[22] and what in

[21] Even the view of the dissent in *Hess* on the importance of control does not assist PRCCCC. Though it does not propose a bright-line rule demarcating the level of control necessary to warrant a finding that an entity is an arm of the state, the *Hess* dissent does observe that such a finding is warranted "if the State appoints and removes an entity's governing personnel and retains veto or approval power over an entity's undertakings." *Hess*, 513 U.S. at 61, 115 S.Ct. 394 (O'Connor, J., dissenting); *see Brotherton v. Cleveland*, 173 F.3d 552, 561 n. 5 (6th Cir.1999). Key elements of control, such as veto power, are absent here.

[22] Zapata states that the team of experts which advised the legislature on the creation of PRCCCC concluded that sixty percent of the hospital's revenues would need to come from legislative (continued...)

fact has happened.

The enabling act does not, as we have said, make the Commonwealth liable for the debts of PRCCCC. Still, it could be that the Commonwealth has assumed that obligation in fact, either directly or indirectly, by providing virtually all the funds needed for the operation of PRCCCC. The facts, discussed below, show that the Commonwealth has not done that. Rather, the Commonwealth has left itself free to provide or not provide funds to PRCCCC as it sees fit, and it has not come close to obligating itself to assume the burden of paying PRCCCC's debt. The Commonwealth has provided for PRCCCC to have independent sources of revenue and, indeed, the majority of PRCCCC's funding now comes from sources other than the Commonwealth's treasury.

We start with the statutory scheme and consider two factors: the provisions as to funding of debts and any provisions for raising revenues. There are no provisions for funding of PRCCCC's debts, just an admonition in the enabling act that PRCCCC must live within its means. The legislative intent seems to be that PRCCCC not incur debts that it cannot pay from budgeted sums. As to revenue, the statutory scheme contemplates a number of sources of income. The statute provides that PRCCCC may

1. borrow money from any funding source, 24 P.R. Laws Ann. § 343b(g);

2. sell its services to private entities, *id.* § 343b(k);

3. sell materials to private entities, *id.* § 343b(m);

[22](...continued)
appropriations. If that is so, then the fact that PRCCCC's enabling legislation does not require the legislature to provide a fixed percentage (or other level) of support for PRCCCC is telling.

4. request and accept federal, state, or other funds and grants, § 343b(o); and

5. enter with others into a corporation, partnership, joint venture, or association, *id.* § 343b(r).

In addition, the statute provides that PRCCCC may issue bonds, *id.* § 343k. It is noteworthy that the Commonwealth is not a guarantor on the bonds.

PRCCCC replies that the capacity to issue bonds and raise revenues is a "dead letter." That is because private lenders will not provide financing "unless the Commonwealth funds are pledged as warranty of payment through the Office of Management and Budget. With an operating deficit that exceeds an [annual] average of $7 million ... PRCCCC does not have the credit that will enable it to borrow money and obtain loans, much less issue bonds." Though relevant, this evidence does not show that PRCCCC's debts would become the Commonwealth's.

PRCCCC also points to the language of the 1986 appropriations act, which provided PRCCCC with $500,000 in initial working capital. Act of June 30, 1986, No. 51, at p. 170, § 13, *quoted in* 24 P.R. Laws Ann. § 343, history. The bill also said:

> The funds needed in subsequent years to carry out the purposes of this act [chapter] shall be consigned in the General Expense Budget of the Government of Puerto Rico.

Id. There are three responses to the argument. First, this is language in an appropriations act for a particular year. Such acts normally expire within the year, and PRCCCC has not presented any argument that the language must be read to extend to all future years. *See Minis v. United States,* 40 U.S. (15 Pet.) 423, 445, 10 L.Ed. 791 (1841). Second, this language was not put into the codified law enacted in 1986, nor has it been added since then. Third, in practice the legislature did not

consider itself bound by that language in years after 1986.

PRCCCC's other argument is that it is required to submit an operating expenses and capital investments budget to the legislature. 24 P.R. Laws Ann. § 343h. That alone does not show that PRCCCC's debts will be paid by the Commonwealth; it is better read as imposing discipline meant to discourage PRCCCC from building up unpaid debts. There is, moreover, no evidence in the record (and the burden is on PRCCCC) that PRCCCC took any steps to comply with this requirement before February 25, 2002, more than three months after it formally asserted an Eleventh Amendment defense to FMC's lawsuit.[23]

We turn to what in practice has happened. "If the state substantially funds the entity, those funds would be a probable source to satisfy any judgment against the entity. On the contrary, if the entity has taxing powers and can issue bonds, state funds might not be at risk in litigation against the entity." *Moore's, supra,* § 123.23[4][b], at 123-57 to 123-58.

PRCCCC witness Bustelo states that PRCCCC receives several types of financial support from government entities: (a) legislative appropriations; (b) reimbursements from insurance companies linked to the Department of Health; (c) payments from the City of San Juan; and (d) "indirect subsidies," which are effectively short-term loans, from public utilities and other public corporations. Because of PRCCCC's relationship to the state, Bustelo contends, public corporations such as PRCCCC's landlord have not initiated eviction proceedings or otherwise denied services when PRCCCC's payments were late.

We start with the most recent history. In FY 2001, PRCCCC

[23] On February 25, 2002, Lúgaro requested a legislative appropriation to pay the rent during FY 2001 and FY 2002 and cover the rest of PRCCCC's deficit.

received over $50 million in revenues. It received nothing in legislative appropriations, although it was running a $12 million deficit. In FY 2002, it *again* received no legislative appropriation. Most of PRCCCC's revenues are from fees for patient services received from private insurance companies, patients, Medicare, Medicaid, or the Commonwealth's public health system,[24] just as revenues come in to private hospitals in Puerto Rico. Looking back further, PRCCCC's legislative appropriations amounted to less than 14 percent of its total revenues from fiscal years 1993 to 2001.

In its role as an insurer, the Commonwealth also reimbursed PRCCCC for particular medical procedures. Even counting these reimbursements, the share of PRCCCC revenues coming from the Puerto Rico government between FY 1993 and 2001 was about 41 percent. These reimbursements were presumably made under the Commonwealth's public health system and the Medicaid program. Since private, for-profit hospitals receive these reimbursements as a matter of course, it is doubtful whether they should be counted for Eleventh Amendment purposes. We do not count payments made by the municipality of San Juan as revenue from the state treasury.

Overall, the share of funding provided by the legislature and by the Commonwealth as a whole has diminished sharply over time. In FY 1993 and 1994, the first two years for which figures are available, the legislature provided approximately 21

[24] Although the Commonwealth participates in Medicare and Medicaid, it also has a separate public health system. Medicare is a federally funded program overseen by part of the federal government; Medicaid is a jointly funded federal-state program overseen by federal and state entities but usually administered at the county level. By contrast, the Commonwealth's own public health system receives no federal funding.

percent of PRCCCC's revenues by appropriation. Counting insurance reimbursements as well as appropriations, the Commonwealth provided over 64 percent of PRCCCC's revenues during that period. In FY 2000 and 2001, the last two years for which complete figures are available, the legislature provided approximately 8 percent and the Commonwealth in toto provided approximately 26 percent of its revenue. As noted above, the legislature provided no appropriation whatsoever during FY 2001 or FY 2002. The elimination of any legislative appropriations presumably reflects the fact that PRCCCC's operational revenues--that is, its fees from providing cardiovascular medical care to patients--increased by approximately 400 percent between FY 1993 and FY 2001.

PRCCCC argues that this accounting understates the Commonwealth's actual contribution to PRCCCC because public utilities and other allegedly government-controlled public corporations have allowed PRCCCC to receive services without paying for them. The record refutes this argument. Like virtually all businesses, PRCCCC has accounts payable: bills from suppliers for goods and services purchased on credit. There is every indication that, as a general practice, PRCCCC pays its accounts to public utilities and other public corporations. For example, Bustelo stated that the legislative appropriation has been used mainly to pay PRCCCC's largest account payable: its debt to the Public Housing Administration (PHA), the state agency that owns its physical plant. PRCCCC has not shown that it has failed to pay any debt, apart from its FY 2001 debt to the PHA, in a timely fashion. Moreover, the FY 2001 PHA debt was only unpaid as of March 2002, and accounts payable are typically due within 12 months.

Between FY 1993 and FY 2001, PRCCCC's operational expenses exceeded its total revenues by approximately $18 million. The income statement does not provide any detail on

the hospital's debt structure; nevertheless, there is no evidence distinguishing this level of debt for an institution whose operational revenues now exceed $50 million per year from private sector debt. PRCCCC's operational revenues have grown at a substantially steeper rate than its operational expenses between FY 1993 and FY 2001.

The fact that PRCCCC receives significant, but diminishing, state funding (now less than thirty percent counting all sources, including insurance) is simply not enough to enable it to claim Eleventh Amendment immunity. *Mt. Healthy,* 429 U.S. at 280, 97 S.Ct. 568. In the end, PRCCCC's argument is simply that a judgment would deplete its operating funds, that the Commonwealth might choose to rescue it, and that this would indirectly deplete the state treasury. We rejected this very argument in *Metcalf & Eddy,* 991 F.2d at 941, and do so here.

C. *Insufficiency of Service of Process*

The district court made factual findings regarding the Rule 12(b)(2) and the associated Rule 12(b)(5) claims. *See Rivera-Flores v. P.R. Tel. Co.,* 64 F.3d 742, 748 (1st Cir.1995). Findings of fact by the district court may not be set aside unless they are clearly erroneous. Fed.R.Civ.P. 52(a); *Anderson v. City of Bessemer,* 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). There was no error.

Rule 4(h)(1) governs service of process upon corporations. Proper service under Puerto Rico law satisfies Rule 4(h)(1). *See Sea-Land Serv., Inc. v. Ceramica Europa II, Inc.,* 160 F.3d 849, 853 (1st Cir.1998). Under Puerto Rico law, process can be served by "leaving [a copy of the summons and complaint] at the registered office or other place of business of the corporation in the Commonwealth." 14 P.R. Laws Ann. § 3126 (2000). Plaintiff unquestionably met this requirement.

III.

We ***affirm*** the district court's decisions that PRCCCC is not an arm of the state and so is not entitled to Eleventh Amendment immunity and that there was adequate service of process. Costs are awarded to plaintiff.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

FRESENIUS MEDICAL CARE CARDIOVASCULAR RESOURCES, INC., Plaintiff

v.

PUERTO RICO AND THE CARIBBEAN CARDIOVASCULAR CENTER CORP., Defendant.

Civ. No. 01-2313 (PG).

OPINION AND ORDER

Before the Court is Defendant's "Motion to Dismiss Pursuant to F. [sic] R.Civ.P. Rule 12(b) (1), (2) [,] (5) and (6)" (Docket No. 9); and "Defendant's Memorandum of Law in Support of its Motion to Dismiss: (Docket No. 15). Plaintiff filed an "Opposition to Motion to Dismiss" (Docket No. 21). Defendant was granted leave to file a Reply to the Opposition (Docket No. 23), but did not file within the allotted period. For the reasons set forth below, the Motion to Dismiss is DENIED.

I. BACKGROUND

Plaintiff Fresenius Medical Care Cardiovascular Resources (hereinafter "FMC") sued in order to enforce a contract between Plaintiff and Defendant Puerto Rico and the Caribbean Cardiovascular Center Corporation (hereinafter "PRCCCC") Compl. ¶ 5-15). FMC alleges breach of contract, breach of the implied covenant of good faith and fair dealing, and seeks specific performance and a declaratory judgment. (*See* Compl. Docket No. 1).

Perfusion Services of Baxter Healthcare Hospital (hereinafter "Baxter-Perfusion") entered into a contract with PRCCCC dated January 1, 1998 (hereinafter "the Agreement"). The Agreement required Baxter to provide PRCCCC with all necessary perfusion services.[1] Subsequent to the Agreement, Baxter-Cardiovascular was spun off from Baxter-International. Baxter-Cardiovascular, the parent company of Baxter-Perfusion, began operating as an independent, publicly traded entity known as Edwards Lifesciences Corporation. Baxter-Perfusion remained owned by Edwards Lifesciences and changed its name again to Edwards Lifesciences Cardiovascular Resources, Inc. (Hereinafter "Edwards"). On or about July 1, 2001, Fresenius Medical Care Cardiovascular Resources Holdings, Inc. ("FMC Holdings") acquired the stock of Edwards and Edwards became a wholly owned subsidiary of FMC Holdings. Edwards changed its name one last time to its present form- Fresenius Medical Care Cardiovascular Resources, Inc. (Compl. at 7-8).

The facts relevant to the contract dispute that is the subject matter of this action are not relevant to the Motion to Dismiss and are therefore omitted.

Defendant makes three arguments in its Motion to Dismiss: first, that the Plaintiff failed to properly serve PRCCCC; second, that the Plaintiff has no standing to bring the present claim; and third, that notwithstanding the other defenses, the Court has no subject matter jurisdiction because PRCCCC is an "arm of the state" under the Eleventh Amendment and is immune from suit in federal court. (*See* Mot. to Dismiss).

[1]Perfusion "refers to the process of employing artificial pumps to propel the blood of open-heart surgery patients through their body tissue, temporarily replacing the function of the heart during a cardiac operation." (Opp'n at 1).

II. STANDARD FOR A MOTION TO DISMISS

When a defendant invokes Fed. R. Civ. P. 12(b) (1), the defendant challenges the Court's jurisdiction to hear the case. Attacks on a court's subject matter jurisdiction are either "facial" or "factual" attacks.[2] Rule 12(b) (1) motions that invoke Eleventh Amendment immunity are generally facial attacks. At times, however, it may be necessary to look outside the pleadings in order to determine whether or not the court has jurisdiction. The motion will therefore constitute a factual attack. *See generally Dynamic Image Technologies v. United States*, 221 F. 3d 34, 37 (1st Cir. 2000). Defendant's motion is a factual attack to the extent that this Court will have to look outside the pleadings to rule on PRCCCC's claim of sovereign immunity. Once PRCCCC has raised the issue of jurisdiction, it is the Plaintiff's burden to demonstrate that the Court has jurisdiction. *Puerto Rico Tel. v. Telecomm. Regulatory Ed.*, 189 F. 3d 1, 7 (1st Cir. 1999).

Under Fed. R. Civ. P. 12(b) (5) a Defendant can challenge the manner in which service of process was carried out. Plaintiff has the burden of showing that the service was carried out in compliance with the Rules. *Sáez Rivera v. Nissan Manufacturing Company*, 788 F. 2d 819, 821 n.2 (1st Cir. 1986). In the instant case, Defendant challenges the authority of the person that allegedly received service. (Mot. to Dismiss at 26). The Court may quash service and afford the Plaintiff an opportunity to serve Defendant again. *Boateng v. Inter American University*, 188 F.R.D. 26, 27 (D.P.R. 1999).

When deciding on a motion to dismiss under Fed. R. Civ. P.

[2]A leading case in making this distinction is *Mortensen v. First Fed. Sav. & Loan Association*, 549 F. 2d 884, 890-91 (3rd Cir. 1977).

12(b)(6), the Court must accept the facts set forth in the plaintiff's complaint as true, and must draw all reasonable inferences in the plaintiff's favor. *Potter v. Nutter*, 913 F. 2d 37, 38 (1st Cir. 1990); *Correa-Martinez v. Arrillaga-Belendez*, 903 F. 2d 49, 51 (1st Cir. 1990). In addition, the Court should not grant a motion to dismiss unless it appears that the plaintiff could prove no set of facts under which he or she could recover. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *Gooley v. Mobil Oil Corporation*, 851 F. 2d 513, 516 (1st Cir. 1988). While this standard is very generous to the plaintiff, it does not follow that it is completely "toothless". *Zeus Projects Limited v. Pérez & Cia*, 187 F.R.D. 23, 26 (D.P.R. 1999). In judging the complaint, the Court must "differentiate between well-pleaded facts, on the one hand, and 'bald assertions unsupportable conclusions, periphrastic circumlocution, and the like' on the other hand; the former must be credited, but the latter can be safely ignored." *Rodríquez-Vázquez*, 160 F. Supp. 2d at 209 (quoting *LaChapelle v. Berkshire Life Insurance Company*, 142 F. 3d 507, 508 (1st Cir. 1998)).

III. DEFENDANT'S ARGUMENTS IN THE MOTION TO DISMISS

A. Challenge to Service of Process

PRCCCC makes a rather cursory argument that the Court does not have personal jurisdiction over Defendant due to deficient service (Mot. to Dismiss at 26). It refers to Exhibit B of the Motion as evidence that service was received by one Ms. Rosa Adorno, who was not authorized to receive service of process. (Id.) In Exhibit B, former Executive Director Luisa Rivera Lúgaro states that "the only persons in the center authorized to receive complaints or any other legal documents are the secretaries of my office in the third floor of the hospital." (Mot. to Dismiss Ex. B). Fed. R. Civ. P. 4(h) (1) provides for service

of process to an officer or to any other agent authorized, by appointment or by law, to receive process. *Doris Trading Corp. v. The S.S. Enterprise*, 406 F. Supp. 1093, 1097 (S.D.N.Y. 1976).

Plaintiff provides the declaration of the process server, stating that the pertinent documents were delivered to Ms. Rosa Adorno. Ms. Adorno informed the process server she was Ms. Lixy Perez's secretary. Ms. Lixy Pérez is PRCCCC's in-house legal advisor. (Opp'n at 11; Opp'n Exhibit A). According to the process server, Ms. Adorno phoned Ms. Perez and informed her of service of process in his presence. Ms. Adorno received documents and is listed in the Summons as the person who received service of process. Subsequently, however, Ms. Perez appeared and the process server personally provided her with the documents. (*See* Opp'n at 12).

The Court can think of no person who would be a more appropriate agent for the receipt of service of process than an in-house legal advisor. Ms. Perez is in a position to know the importance of a summons and complaint and to immediately take pertinent actions to ensure that prompt and meaningful notice is provided to the Defendant corporation. Obviously, Defendant received adequate notice from an appropriate agent since they filed their responsive pleading October 30, 2001, three weeks after service occurred. For the reasons set forth above, the Defendant's Motion to Dismiss under Rule 12(b) (5) is DENIED.

B. Defendant's Argument Based on Standing:

Defendant also argues that since FMC is not a party to the agreement, FMC has no standing to bring the present action. (Mot. to Dismiss at 7).

Defendant's argument overlooks a basic precept of corporate

law: when a corporation changes its name it retains all its essential attributes prior to the name change. When Edwards (the contracting party) became FMC, FMC retained all the rights, assignments and liabilities of Edwards. *Alley v. Miramon*, 614 F. 2d 1372, 1384 (5th Cir. 1980).

The standard to evaluate a claim of lack of standing is much the same as the standard employed to rule on a Fed. R. Civ. P. 12(b) (6) motion. *Rental Housing Assoc. of Greater Lynn v. Hills*, 548 F. 2d 388, 391 (1st Cir. 1977). It is sufficient for FMC to allege that it is the successor corporation of Edwards in order to withstand a motion to dismiss. *United States v. AVX Corporation*, 962 F. 2d 108, 114 (1st Cir. 1992). Plaintiff asserts a redressable injury, i.e. a breach of contract, that was allegedly caused by Defendant. Under the standard set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Plaintiff's claim cannot be dismissed at this procedural juncture for lack of standing. Therefore, in accordance with the above, the Defendant's Motion to Dismiss for lack of standing is DENIED.

C. Eleventh Amendment Immunity:

The Eleventh Amendment[3] grants immunity unconsenting states from suit in federal courts. Sovereign immunity under the Eleventh Amendment extends beyond the core of the state government to "arms of the state." *Metcalf & Eddy v. Puerto Rico Aqueduct & Sewer Authority*, 991 F. 2d 935, 939 (1st Cir.

[3]The text reads in full: "The Judicial Power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. AMEND. IX.

1993). The Eleventh Amendment applies to Puerto Rico in the manner, and to the same extent, as a state. *De León López v. Corporación Insular de Seguros*, 931 F. 2d 116, 121 (1st Cir. 1991).

Defendant PRCCCC claims to enjoy the same sovereign immunity granted any arm of the state (Motion to Dismiss at 8-26). Specifically, it claims that it is inextricably linked with the Commonwealth Department of Health and therefore, the Department's sovereign immunity should be extended to PRCCCC (Motion to Dismiss at 9-13). The Court must decide whether or not PRCCCC is an arm of the state, looking to its functions and attributes in order to make that determination.

1. Access to the State Fisc:

In the seminal case of *Metcalf*, 991 F. 2d 935 (1st Cir. 1993), the First Circuit determined that the purpose of the 'arm of the state' analysis is to protect the state treasury from having to satisfy a judgment against a government entity. *Id.* at 939. "A 'slice of state of power without more will not sate the Eleventh Amendment.' " *Id.* (quoting *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979)). Political subdivisions do not enjoy Eleventh Amendment immunity. *Owen v. City of Independence*, 445 U.S. 622, 650 (1980). The state must be the real party in interest, which would then obligate the Court to grant the pertinent entity Eleventh Amendment immunity. *Ford Motor Company v. Department of the Treasury*, 323 U.S. 459 (1945); *see also Lake County*, 440 U.S. at 400-401. Therefore, our primary inquiry is directed at the fiscal characteristics of the agency or entity in question. *Buck v. Puerto Rico Symphony Orchestra Corporation*, 849 F. Supp. 141 (D.P.R. 1994) (*citing Quern v. Jordan*, 440 U.S. 332, 337, (1979); *Eldelman v. Jordan*, 415 U.S. 651 (1974)).

In *Metcalf*, the First Circuit scrutinized the Puerto Rico Aqueduct and Sewer Authority's (PRASA) access to the Commonwealth Treasury and considered it to be the principal issue. *Id.* at 940. In PRASA's case the appeals court resorted to the unambiguous terms of PRASA's enabling act. *Id.* (*See* 22 P.R. LAWS ANN. § 144). The statute created a 'wall' between the agency and the public fisc. *Metcalf*, 991 F. 2d at 940. Defendant argues that no such wall exists in the instant case, (Mot. to Dismiss at 21), and that therefore, PRCCCC should enjoy immunity. However, the 'wall' between the public fisc and the entity is not a dispositive element under Eleventh Amendment analysis as developed in *Metcalf*.

The Defendant argues that, should the the Plaintiff prevail the judgement would have to be satisfied by the Commonwealth of Puerto Rico. (Mot. to Dismiss at 21). They argue that since PRCCCC is operating under a multimillion dollar deficit, the Commonwealth would have to satisfy the judgement. (*Id.*) This argument overlooks that the Court's essential inquiry, in accordance with *Metcalf*, is the fiscal structure of the entity and not the particular financial status as it relates to a particular entity.

It is worth noting that until *Metcalf*, the inquiry into Eleventh Amendment immunity in this Circuit initially focused on the percentage of the budget the governmental agency received directly from the state. *In re San Juan Dupont Plaza Hotel Fire Litigation*, 888 F. 2d 940, 943 (1st Cir. 1989). In that case, the court reasoned that, since the Tourism Company received 72.9% of its operating budget from the general funds of the Puerto Rico treasury, the agency was protected by Eleventh Amendment immunity. *Id.* While the court looked at other factors, the court held that any judgement against the Tourism Company would be paid by the Puerto Rico Treasury. *Id.*

This Court attempted to reconcile *Dupont Plaza* and *Metcalf*

in *Buck*, 849 F. Supp. at 146-147 (stating that the First Circuit "...narrowed its focus...on the issue of whether the Commonwealth had a legal obligation to satisfy a judgement..."). The most important factor after *Metcalf* in First Circuit case law has become "whether an adverse judgement will be satisfied by the state treasury." *Great River Indus. v. Public Serv. Comm'n of Puerto Rico*, 131 F. Supp. 2d 265 (D.P.R. 2001) (citing *University of Rhode Island v. A.W. Chesterton Company*, 2 F. 3d 1200, 1203 (1st Cir. 1993); *Meléndez v. Commonwealth of Puerto Rico*, 845 F. Supp. 45, 48 (D.P.R. 1994)). The analyses in *Metcalf* and *Dupont Plaza*, however, continue to be linked since the funds provided directly by the state treasury to an entity will necessarily constitute a percentage of the total amount to be used in satisfying any adverse judgement against the entity.

The Plaintiff indicates in its Opposition that where an entity's financial reliance on the government amounts to less than 50% of its funding, courts have consistently held that an adverse judgement will not be satisfied by the state treasury. (Opp'n at 17). While Plaintiff's contention may be true, it is the Court's opinion that a rigid analysis of an entity's budget is contrary to the factual analysis emphasized by the First Circuit in *Metcalf*, 991 F. 2d at 940 and *University of Rhode Island*, 2 F. 3d at 1203-5. It is also not necessary to delve into that issue in the instant case since the income statement of PRCCCC reflects that it received grants from the legislature for its operating budget that are disproportionate to its revenues. PRCCCC received $51 million in government grants and had a net income of $373 million between 1992-2001. (Mot. to Dismiss Ex. 5). This constitutes almost 14% of what Plaintiff collected in revenues for those years combined. In fact, other than in fiscal years 1992-1993 and 1994-1995, Defendant never received more than 17% of its revenues thru grants from the government.

The amount of PRCCCC's revenues and profits contrast favorably with other cases where the court found Eleventh Amendment immunity, such as *In re Dupont Plaza*, 888 F. 2d at 943 (1st Cir. 1993) (70-75% of budget provided by state and did not operate for profit); *Buck*, 849 F. Supp. at 146 (75-89% and engaged in promoting cultural activities) and *Great River Indus.*, 131 F. Supp. 2d at 270 (84% of the budget and engaged in non-profit public service).

Defendant argues that it cannot satisfy a judgement given the multimillion dollar losses that it has incurred over the years. In essence, the Commonwealth of Puerto Rico treasury, at the direction of the legislature, could have effectively bailed them out. Section 13 of the enabling law, not codified, states that the funds needed shall be cosigned from the General Expense Budget of the state treasury. However, this does not inevitably mean that it is the only source or even a substantial source of funding. *See Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280-281 (noting that only "significant amount of money" should yield Eleventh Amendment immunity). "The core jurisdictional fact, after all, is financial autonomy." *University of Rhode Island*, 2 F. 3d at 1216.

Moreover, the deficit argument belies a subsequent argument made by Defendant that they have an "open tap" into the treasury. (Motion to Dismiss at 22). In fiscal year 2000-2001, the Puerto Rico treasury provided no funding whatsoever, notwithstanding past deficits. (Mot. to Dismiss Ex. 5). Defendant was granted an initial unconditional grant of $500,000, pursuant to its enabling statute, to begin the project in 1986. (Section 13 of Law 51, not codified in PR LAWS ANN.) Unfortunately, for Defendant, the Puerto Rico legislature's "control of the money flow from tax dollars is unilateral;...." *Metcalf*, 991 F.2d at 941. PRCCCC freely admits to be

operating at a loss for the past several years, a loss that the legislature was apparently under no affirmative obligation to remedy according to the enabling statue. "...[I]f the Commonwealth chooses not to open the faucet, the agency must go thirsty or else, by resort to its own devices, procure the funds needed to stay liquid." *Id.* The First Circuit held that "a state agency cannot claim Eleventh Amendment immunity solely on the basis that judgments against it may absorb unrestricted funds donated by the state and, in that way rebound indirectly to the depletion of the state's treasury." *Id.* This is Defendant's main argument: since PRCCCC is operating at a loss, the state may have to satisfy a judgment against it. As a matter of law, this argument alone is not sufficient after *Metcalf*, and therefore, Defendant's argument is severely flawed. As in *Flitchnik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 660 (3rd Cir. 1989), "[t]he most striking financial detail is that New Jersey Transit's money does not come predominantly from the state." Similarly, PRCCCC's money does not come predominantly from the state.

The facts indicate that PRCCCC should not enjoy Eleventh Amendment immunity based on its access to the state fisc, or in the inverse, the legal obligation of the Puerto Rico treasury to satisfy a judgment against PRCCCC. However, other factors, remain to be explored.

2. Other Factors under *Metcalf*:

The First Circuit has developed an additional list of factors to be considered in "arm of the state" analysis. These are whether an entity (1) performs an "essential" or "traditional" governmental function as opposed to a nonessential or proprietary one; (2) exercises substantial autonomy over its internal operations; (3) enjoys meaningful access to, and control over, funds not appropriated from the state treasury; (4)

possesses the status of separate "public corporation"; (5) may sue and be sued in its own name; (6) can enter into contracts in its own name; (7) has been granted a state tax exemption on its property; (8) has been expressly debarred from incurring debts in the state's name or behalf. *Great River Indus.*, 131 F. Supp. 2d at 270; *University of Rhode Island*, 2 F.3d at 1205; *Metcalf*, 991 F.2d at 939-940.

The particular type of activity that an entity is engaged in can determine whether or not the entity is immune from suit under the Eleventh Amendment. *Compare Royal Caribbean Corporation v. Puerto Rico Ports Authority*, 973 F.2d 8, 9 (1st Cir. 1992) and *Puerto Rico Ports Authority v. M/V Manhattan Prince*, 897 F.2d 1, 10 (1st Cir. 1990) (In these two cases, the same agency invoked Eleventh Amendment immunity based on governmental function. In the former, the immunity was granted, and in the latter it was denied). Defendant claims it is providing an essential government duty because it is constitutionally obligated to provide health services. (Mot. to Dismiss at 9-10). Defendant attempts to 'bootstrap' the duty of the Department of Health to care for the health of all Puerto Ricans vis-á-vis the duty of PRCCCC as a provider of cardiovascular health care.[4] In general, providing medical services for a fee is akin to running a private business.

Defendant attempts to bolster the 'governmental function' argument by referring to its enabling statue, 24 P.R. LAWS ANN. § 343 *et seq*. The Defendant highlights Section 343b which charges PRCCCC with "...the responsibility of framing or executing public policy with regard to... cardiovascular services to be provided in Puerto Rico." 24 P.R. LAWS ANN. § 343b.

[4]Defendant seeks to do argue this by referring to Article II, §§ 19-20 of the Constitution of Puerto Rico which directs the Executive to provide medical assistance to the people of Puerto Rico.

Notwithstanding this statement, the First Circuit has held that express legislative purposes in statutes, directing entities to engage in policymaking, do not automatically eviscerate the 'proprietary' function. *Royal Caribbean Corp.*, 973 F.2d at 12 (referring to *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1421 (9th Cir. 1991)). In the instant case, PRCCCC acts as any other private health care provider: it has patients that come in, may or may not pay a fee, and get a particular procedure. The Court is not oblivious to the fact that PRCCCC may operate at a loss because they provide services to those who cannot afford to get them elsewhere. Notwithstanding, the general purpose is to provide services to the public for a fee, and for that purpose PRCCCC prices its services in order to operate for a profit.

Defendant cites *Rodríquez Díaz v. Sierra Martínez*, 717 F. Supp. 27 (D.P.R. 1989) for the proposition that PRCCCC performs a governmental function (Mot. to Dismiss at 24-26). Two important analytical distinctions differentiate *Rodríquez Díaz* from the instant case. First, the court in *Rodríquez Díaz* reached the conclusion in that case before *Dupont Plaza* and *Metcalf* were decided. Second, the agency in question, ASEM (Puerto Rico Medical Services Administration) had bilateral access to the treasury (i.e. shortfalls were automatically provided from other state agency budgets) and the agency was under the complete control of the Secretary of Health. *Rodríquez Díaz*, 717 F. Supp. at 30. PRCCCC cannot avoid the conclusion that they are not engaged in a governmental function, and are therefore not entitled to Eleventh Amendment immunity.

As to the rest of the factors set forth in First Circuit case law, the Court shall proceed in turn. It is apparent from the enabling statute that PRCCCC has substantial autonomy over its internal structure and affairs. For example, 24 P.R. LAWS ANN. § 343b directs PRCCCC to, among other things, prepare its own

budget, establish the criteria for services, establish internal procedures for accreditation of employees, establish its own administrative structure, borrow money from private or public sources, enter into agreements, leases and contracts, and participate in joint ventures and partnerships. In a nutshell, PRCCCC controls its own internal structure and its relationship with other legal entities.

While PRCCCC has a great degree of autonomy, the Governor appoints the seven members of the Board. 24 P.R. LAWS ANN. § 343c. Three board members are ex officio from other appointed positions: the Secretary of Health, the Rector of the Medical Sciences Campus of the University of Puerto Rico, and the Executive Director of the Puerto Rico Medical Services Administration. The remaining four are appointed by the Governor in staggered terms and for a fixed term. This mechanism dilutes the degree of control the Governor may exert since she cannot implement fast and sweeping policy changes by merely ousting four Board members at any one time. *University of Rhode Island*, 2 F.3d at 1208. This is also in contrast to the structure of ASEM in the *Rodríquez Díaz* case (where the Secretary of Health controlled the Board and there were no staggered terms).

As stated above, PRCCCC also enjoys access to funding sources outside the state treasury. In addition to its ability to enter into joint ventures, partnerships and the like; and to seek financing from any source, public or private; PRCCCC is expressly authorized to issue bonds on its behalf in order to raise capital. 24 P.R. LAWS ANN. § 343k. Moreover, PRCCCC is permitted to pledge all or any of its assets in order to secure the payment of the bonds. *Id.* The statute does not expressly allow PRCCCC to pledge assets on behalf of the Commonwealth of Puerto Rico, nor does it expressly prohibit it.

Defendant is also designated as an "entity which is

independent and separate from any other agency or instrumentality of the Government of the Commonwealth of Puerto Rico..." 24 P.R. LAWS ANN. § 343a. It can sue and be sued in its own name. 24 P.R. LAWS ANN. § 343b(i). It can enter into contracts. 24 P.R. LAWS ANN. § 343b(k) (as is obvious from the subject of the instant action). As Plaintiff correctly points out, Defendant is expressly authorized to enter into contracts with the Department of Health, the very agency of which it purports to be an alter ego. 24 P.R. LAWS ANN. § 343b(n).

Defendant is entitled to a tax exemption under its enabling statute. 24 P.R. LAWS ANN. § 343e. Most private hospitals are tax exempt under the United States Code. *See* 28 U.S.C. § 501 (c) (3). In addition, "in many cases this factor is considered minimally probative. Often, tax policy is used by the States to encourage certain types of activity even though the target entities are otherwise entirely independent of state government." *University of Rhode Island*, 2 F.2d at 1209. Defendant has not been expressly barred from incurring debts on behalf of the Commonwealth of Puerto Rico, but the financing structure detailed above leads the Court to believe that the legislature intended for PRCCCC to be able to finance itself (e.g. with bonds or private joint ventures) and generate revenues to keep itself in the black.

After an evaluation of the factors set forth in *Metcalf*, *University of Rhode Island*, and this Court's analysis in *Buck*, 849 F. Supp. 141, and *Great River Inds.*, 131 F. Supp. 2d 265, the Defendant's contention that it is entitled to Eleventh Amendment immunity as an arm of the state is DENIED.

IV. CONCLUSION

For the reasons set forth above, Defendant's Motion to

Dismiss (Docket No. 9), supplemented by its Memorandum of Law (Docket No. 15), is DENIED.

SO ORDERED

San Juan, Puerto Rico, March 18, 2002.

Juan M. Perez-Gimenez
U.S. District Judge

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

FRESENIUS MEDICAL CARE CARDIOVASCULAR RESOURCES, INC., Plaintiff

v.

PUERTO RICO AND THE CARIBBEAN CARDIOVASCULAR CENTER CORP., Defendant.

Civ. No. 01-2313 (PG).

OPINION AND ORDER

Before the Court is Defendant's "Second Motion for Reconsideration" (Docket No. 32) and the Plaintiff's Opposition thereto (Docket No. 33) For the reasons stated below, the Motion for Reconsideration is DENIED.

Defendant devotes twelve pages of a rather voluminous Motion for Reconsideration to reargue the argument made in its Motion to Dismiss (Docket No. 9) that it is entitled to Eleventh Amendment immunity. This Motion was denied by the Court in an Opinion and Order dated March 18, 2002. (Docket No. 29) From that Opinion and Order, Defendant seeks relief.

Defendant makes no novel legal argument to bolster its claim that it is entitled to Eleventh Amendment immunity, save the allegation that it receives more money from the Commonwealth of Puerto Rico than the Court had previous notice of when emitting its Opinion and Order (Mot. for Reconsideration at 13). Defendant argues that Plaintiff may have misled the Court in its Opposition to the Motion to Dismiss by incorrectly quoting figures of legislative appropriations as opposed to total

government appropriations. (Mot. for Reconsideration at 13-14, 14 fn.8.) As a counterpoint, Defendant provides figures that include executive grants and appropriations from the Commonwealth Department of Health. Defendant states that the percentage of funds allocated is more akin to 43.28% of the PRCCCC's budget. (Mot. for Reconsideration at 13, Ex. 5 at ¶ 10)

Ever mindful that the federal court must always assure that jurisdiction is properly invoked, and in an effort to give full effect to the protections of the Eleventh Amendment of the United States Constitution, the Court will review its determination in light of this information. The Eleventh Amendment was enacted to protect the sovereign immunity of the States of the Union in the federal system. *Edelman v. Jordan*, 415 U.S. 651 (1974). Defendant cites a variety of cases construing the Eleventh Amendment to apply to agencies or arms of the state. Defendant also contends that the Court misconstrued the First Circuit's holding in *Metcalf & Eddy v. Puerto Rico Acqueduct & Sewer Auth.*, 991 F.2d 935, 939 (1st Cir. 1993).

To begin with it must be noted that Plaintiff never attempted to mislead the Court with any adjusted budget percentage numbers, as Defendant argues. In fact, Plaintiff only interpreted the numbers provided by Defendant in its Motion to Dismiss. Therefore, any errors or oversights were, strictly speaking, Defendant's errors or oversights.

The Motion for Reconsideration relies largely on cases from other Circuits that were decided before *Metcalf*. Principally, Defendant relies on two Supreme Court cases, two cases from other Circuits and a voluminous District Court opinion. Defendant cites *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), to support the proposition that PRCCCC should be granted Eleventh

Amendment Immunity. A careful reading of that case reveals that it dealt with a bi-state agency which performed a traditional state function and was still held not to be immune from suit in the federal courts. *Id.* at 402. This bi-state commission required not only the approval of two states, but also the consent of Congress pursuant to the Compact Clause.[1] The Defendant's reliance on this case is misplaced given that the structure and function of the agency was significantly different to that of PRCCCC.

Defendant also relies on *Feeney v. Port Authority Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir. 1989). This case was affirmed by the Supreme Court on grounds of waiver of Eleventh Amendment Immunity, *sub nomine Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990). In the same vein, *Hess v. Port Authority Trans Hudson*, 513 U.S. 30 (1994), was decided based on the presumption that a bi-state agency approved by the Compact Clause does not have immunity unless both states expressly provide for it. *Id.* at 35-39.

Finally, Defendant cites *Daniel v. American Board of Emergency Medicine*, 988 F.Supp. 127 (W.D.N.Y. 1997), arguing that if there is any exposure to the state treasury the court must find that Eleventh Amendment immunity exists. While the holding in *Daniel* supports Defendant's argument that PRCCCC is entitled to immunity from suit in federal court, this case is neither dispositive nor is it consistent with the First Circuit's holding in *Metcalf*. While Defendant argues that the Court misapplied the law (one of several times Defendant so contends), the Court was merely making a factual finding that PRCCCC is providing a service traditionally provided by the

[1] U.S. CONST. Art. I, § 10, cl. 3

private sector. The Court need not have, as Defendant states, based its inquiry on whether the entity providing the service was the state, as it was not the holding in *Metcalf*. (Mot. for Reconsideration at 7) Defendant then has the temerity to quote *Metcalf* for the proposition that "the primary concern [of the Eleventh Amendment] is to minimize federal court's involvement in disbursal of the state fisc." *Metcalf* at 939. That, in this Court's view, encompasses the central holding of *Metcalf*. Defendant is obviously attempting to submit cases that were not decided in this Circuit because the *Metcalf* inquiry has yielded limited success.

Finally, Defendant argues that the First Circuit in *Metcalf* meant for the language referring to a wall between the agency and the state fisc to be dispositive of whether or not the Eleventh Amendment should apply. Defendant's argument is unpersuasive, particularly in view of the qualification that the inquiry into immunity is "essentially [a] functional [one], not easily amenable to bright-line answers or mechanical solutions." *Metcalf* at 939. In addition, the enumeration of a long list of factors for guidance on this, at times, befuddling issue is testament to the First Circuit's holding that few things are absolute in this area of Constitutional law.

As a conclusion, this Court holds that the PRCCCC is not "sufficiently a part of the central government to be considered a part of the state." For that reason, and the reasons stated above, Defendant's second Motion for Reconsideration (Docket No. 32) is DENIED.

SO ORDERED.

San Juan, Puerto Rico, May 7, 2002.

Juan M. Perez-Gimenez
U.S. District Judge

LAWS OF PUERTO RICO ANNOTATED

TITLE TWENTY-FOUR. Health and Sanitation

PART I. HOSPITALS, INSTITUTIONS, AND HEALTH PROGRAMS

CHAPTER 20B. Puerto Rico and Caribbean Cardiovascular Center Corporation

§ 343. Title.

This chapter shall be known as the "Puerto Rico and the Caribbean Cardiovascular Center Corporation Act".

[June 30, 1986, No. 51, p. 170, § 1.]

§ 343a. Creation.

A public corporation is hereby created which shall be known as the "Puerto Rico and the Caribbean Cardiovascular Center Corporation". Said Corporation shall function as an entity which is independent and separate from any other agency or instrumentality of the Government of the Commonwealth of Puerto Rico, and shall be governed by a Board of Directors.

[June 30, 1986, No. 51, p. 170, § 2.]

§ 343b. Purpose, powers and functions.

The Puerto Rico and the Caribbean Cardiovascular Center Corporation shall be the body that shall have the responsibility of framing or executing public policy with regard to the planning, organization, operation and administration of the

cardiovascular services to be provided in Puerto Rico. It also shall perform, through its Board of Directors, the coordination needed to attain its ends and purposes with the Department of Health, the Medical Sciences Campus of the University of Puerto Rico, the Medical Services Administration and the private sectors involved in providing cardiovascular services in Puerto Rico:

To these ends, it shall have the following powers and functions:

(a) To prepare an annual operating budget proposal.

(b) To establish the services, units and departments needed for the effective, expeditious, efficient and economical functioning of the Corporation.

(c) To establish and implement adequate mechanisms to guarantee the quality of the services rendered to the patients and the prompt evaluation and correction of any faults or deficiencies that arise in the rendition of such services.

(d) To establish and implement appropriate mechanisms for the evaluation of credentials and for the approval, suspension or revocation of privileges to practice in the Corporation's facilities.

(e) To adopt an official seal.

(f) To establish its own administrative structure.

(g) To borrow money from any financing source, including private institutions, as well as from the Government of the Commonwealth of Puerto Rico and the government of the United States.

(h) To have complete control and supervision of all the Corporation's equipment and facilities acquired and constructed by the Public Buildings Authority including, without being limited thereto, the power to determine the nature and need of

all the expenses and the manner they may be incurred, allowed and paid for.

(i) To sue and be sued.

(j) To draft, adopt and amend the rules and regulations needed for its functioning.

(k) To negotiate and enter into all kinds of contracts, documents and other public instruments with persons, firms, corporations, government agencies and other entities to achieve the purposes of this chapter, including the sale of services to private persons or entities, commercial insurance companies, labor unions, prepaid public and private health plans and associations with health plans for health services rendered to them.

(l) To appoint, contract and designate medical personnel to provide direct treatment to patients in the Center.

(m) To purchase all materials, supplies, equipment, spare parts and services that are needed, and to dispose of such materials, supplies and spare parts by sale, transfer or other conveyance to other entities, or by destruction or other means the Corporation may deem most convenient when they no longer serve their purpose.

(n) To enter into agreements, leases, contracts and other necessary instruments with the Department of Health, the Medical Sciences Campus of the University of Puerto Rico and with any other bodies and instrumentalities of the Commonwealth of Puerto Rico.

(o) To request, receive and accept funds and federal, state or any other type of grants.

(p) To carry out on its own or by contracting therefor the construction, improvement, extension, expansion or repair works needed by the Corporation to fulfill its objectives or

purposes.

(q) To own, acquire and transfer movable and immovable assets and mortgage or lease any of them with their rights and privileges, within the limits prescribed by law. The faculty to possess movable and immovable assets shall include the right to acquire them by legacy.

(r) To participate with others in a corporation, partnership, joint venture or association of any transaction, business arrangement or agreement for which the participating corporation is entitled to carry out per se.

[June 30, 1986, No. 51, p. 170, § 3.]

§ 343c. Board of Directors.

The powers of the Puerto Rico and the Caribbean Cardiovascular Center Corporation shall be conferred to and performed by its Board of Directors.

The members of the Board shall be of legal age, residents of Puerto Rico and committed to promote the development in the field of cardiology.

The Board shall be composed of seven (7) members of which the following three (3) shall be ex officio members: the Secretary of Health of Puerto Rico, the Rector of the Medical Sciences Campus of the University of Puerto Rico, and the Executive Director of the Puerto Rico Medical Services Administration.

Of the four remaining members, two (2) shall be: a representative of the Puerto Rican Cardiology Society, and a representative of a nonprofit cardiology foundation which is duly registered in the Department of State of the Commonwealth of Puerto Rico. These four (4) members shall be appointed by the Governor of Puerto Rico; two (2) of which

shall be appointed for an initial terms of two (2) years, and the other two (2), for three (3) years. As their initial terms expire, the Governor shall appoint their successors for four (4)- year terms.

In case of a vacancy, resignation, death or removal, the person selected to replace the member who has resigned, died or been removed, shall hold office for the unexpired term of the original member.

The Secretary of Health of Puerto Rico shall be Chairman of the Board, who shall designate a Vice Chairman and a Secretary. The Secretary of the Board shall not necessarily have to be a member of the Board. Four (4) members of the Board shall be the quorum for conducting its affairs and any other matter, and any agreement of the Board shall be made with the concurrent vote of at least four (4) of its members.

It shall be the duty of the Board to designate an Executive Director to whom it shall delegate the needed powers and faculties and who shall be responsible for the operational and administrative phases of the Corporation.

The Board shall appoint a Medical Director who shall be answerable to the Executive Director, except for decisions of a medical nature. The Executive Director and the Medical Director shall submit quarterly and annual reports to the Board concerning the operational, medical and financial status and activities.

[June 30, 1986, No. 51, p. 170, 4; Aug. 21, 1990, No. 2, p. 1393.]

§ 343d. Executive Director.

In addition to the powers and faculties conferred on the Executive Director by this statute, he shall have all the powers,

faculties, attributes and rights that the Board of Directors shall delegate on him among which, without being limited thereto, shall be:

(a) To appoint a Deputy Director. In case of the absence or temporary disability of the Executive Director, the Deputy Director shall take his place and shall exercise all the Executive Director's functions and rights during said absence or disability. In case of the Executive Director's death, resignation or dismissal from office the Deputy Director shall perform all his functions until a successor is appointed.

(b) To plan, direct and supervise the operations of the Corporation and its programs.

(c) To delegate to subordinate officials any function or power assigned by this or any other law, except the power to promulgate regulations which cannot be delegated.

[June 30, 1986, No, 51, p. 170, § 5.]

§ 343e. Exemptions.

The Corporation shall be exempted from all types of taxes, duties, imposts or fees, including license fees, imposts or those imposed by the Commonwealth of Puerto Rico or any of its political subdivisions, including all of its operations, movable or immovable properties, capital, income and surplus.

The Corporation is likewise exempted from the payment of all types of rights or imposts required by law for the execution of judicial proceedings, the issuing of certificates in the offices and dependencies of the Government of the Commonwealth and its political subdivisions and the granting of public documents and their registration in any public registry of Puerto Rico.

[June 30, 1986, No. 51, p. 170, § 6.]

§ 343f. Transfer of land.

Any of the land which was transferred to the Puerto Rico Medical Services Administration by §§ 342-342r of this title, which is needed to carry out the purposes of this chapter, is hereby transferred to the Corporation.

[June 30, 1986, No. 51, p. 170, § 7.]

§ 343g. Working plan and construction.

The final working plan and the construction of the building that shall house the Puerto Rico and the Caribbean Cardiovascular Center Corporation shall rest upon the Public Buildings Authority, which shall charge a reasonable rent for the use thereof once it is finished and turned over to the Board of Directors. This rent shall help to amortize the debt for a period of thirty (30) years.

The equipment needed for the operation of the Puerto Rico Cardiovascular Center shall be acquired by the Public Buildings Authority.

[June 30, 1986, No. 51, p. 170, § 8.]

§ 343h. Budget.

The Board of Directors of the Puerto Rico and the Caribbean Cardiovascular Corporation shall submit an operating expenses and capital investments budget to the Legislature, through the Office of the Governor, which should contain a statement of estimated income and a disbursement program based on a working plan and the services to be rendered by the Corporation.

The Corporation's Board of Directors shall establish the fiscal, budgetary and cost controls needed to keep the budget within

the limits of its estimated income so as to keep from incurring shortfalls.

[June 30, 1986, No. 51, p. 170, § 9.]

§ 343i. Reports.

The Executive Director of the Puerto Rico and the Caribbean Cardiovascular Center shall render a semiannual report of the work accomplished to the Board of Directors, which shall, in turn, send a copy to the Governor or the official to whom he delegates.

[June 30, 1986, No. 51, p. 170, § 10.]

§ 343j. Exclusions; regulations.

The Corporation shall be excluded from the provisions of §§ 1301-1431 of Title 3, known as the "Puerto Rico Public Service Personnel Act", as well as from the provisions of the Purchasing and Supply Act of the Commonwealth of Puerto Rico, and all the regulations promulgated by virtue thereof.

It shall, nevertheless, approve General Regulations to implement the provisions of this chapter within ninety (90) days immediately after its effective date. It shall also approve Personnel Regulations and Purchasing Regulations within the same term.

[June 30, 1986, No. 51, p. 170, § 11.]

§ 343k. Bonds

(a) The Puerto Rico and the Caribbean Cardiovascular Center Corporation is hereby empowered to issue bonds at any one time or from time to time for the purposes of this chapter. The bonds of each issue shall bear the date, shall mature in a term or

terms that shall not exceed forty (40) years from their respective dates and shall accrue interest at a rate that shall not exceed the maximum interest rates established by law for the sale of bonds of the Commonwealth of Puerto Rico as determined by the Corporation, and may be redeemed before maturity at the Corporation's option at such price or prices and under such terms and conditions that may be determined by the Corporation prior to the bond issue. The Corporation shall determine the form and manner of executing the bonds and the place or places where the interest thereon shall be paid. When a bond or coupon bears a signature or a facsimile, it shall, nevertheless, be valid and sufficient, and deemed for all purposes as if the official had remained in office until said delivery. Regardless of any other provision of this chapter, or the language on any bonds issued pursuant to the provisions hereunder, such bonds shall be deemed as negotiable instruments under the laws of the Commonwealth of Puerto Rico. The bonds may be issued as coupon bonds or registered bonds or both, as determined by the Corporation, and the registration of any coupon bonds may be provided with regard to principal and interest. The Corporation may sell such bonds in such a way, in public or private sale and for the price or prices which are not less than the percentage of their par value established by law for the sale of Commonwealth of Puerto Rico bonds which the Corporation deems most convenient for its interests. The yield of each bond issue shall be used exclusively for the purpose for which said bonds were authorized and shall be disbursed in such a form and under such restrictions, if any, that the Corporation may provide in the resolution authorizing said bond issue or in the trust agreement securing the bonds.

The resolution providing for the bond issue and any trust agreement to secure them may contain such limitations with regard to the bond issue as the Corporation may determine.

Prior to the preparation of the definite bonds, the Corporation may issue interim receipts or temporary bonds, with or without coupons. that can be exchanged for the definite bonds when it has completed their preparation. The Corporation may provide for the replacement of any bonds that are mutilated, destroyed or lost.

(b) The bonds issued pursuant to the provisions of this chapter may be secured at the Corporation's discretion by a trust agreement between the Corporation and a corporate trustee which may be any trust company or bank that has the powers of a trust company within or without the Commonwealth of Puerto Rico. The resolution authorizing the bond issue or trust agreement may pledge all or any part of the Corporation's credits or other income, and may provide for the Corporation's property to be mortgaged to secure the payment of the principal and interest of such bonds, and may include such other provisions for the protection and exercise of the rights and remedies of the bondholders, and any other provisions that the Corporation finds are reasonable and proper.

(c) All the bonds issued pursuant to the provisions of this Chapter and the interest accrued thereby shall be exempted from taxes at all times.

[June 30, 1986, No. 51, p. 170, § 12.]

Act of June 30, 1986, No. 51, 2nd Reg. Sess., 10th Assembly, § 13, at 178.

Section 13 - Appropriation of Funds

The sum of five hundred thousand (500,000) dollars is hereby appropriated from the unencumbered funds in the Commonwealth Treasury to the Puerto Rico and the Caribbean Cardiovascular Center as initial working capital to carry out its purposes and functions. The funds needed in subsequent years to carry out the purposes of this act shall be consigned in the General Expense Budget of the Government of Puerto Rico.

These funds may be matched with other available resources in the state government of any municipal government, or any other grant of the government of the United States or with private donations.

Supreme Court, U.S.
FILED
AUG 2 2 2003
OFFICE OF THE CLERK

No. 03-129

IN THE

Supreme Court of the United States

PUERTO RICO AND THE CARIBBEAN CARDIOVASCULAR CENTER CORP.,

Petitioner,

v.

FRESENIUS MEDICAL CARE CARDIOVASCULAR RESOURCES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent Fresenius Medical Care Cardiovascular Resources, Inc. is fully owned by Fresenius Medical Care Cardiovascular Resources Holdings, Inc.

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INTRODUCTION

Plaintiff/Respondent Fresenius Medical Care Cardiovascular Resources, Inc. ("FMC" or "Respondent")[1] respectfully submits this Opposition in response to the Petition for Writ of Certiorari ("Petition") filed by Defendant/Petitioner Puerto Rico and the Caribbean Cardiovascular Center Corp. ("PRCCCC").

PRCCCC's Petition presents three questions for review.

First, PRCCCC asks whether, under *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994), and *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997), federal courts must give "substantial deference" to the legislative and policy decisions made by a state in structuring an entity. PRCCCC argues that the courts **must** defer to state law in deciding whether an entity was intended to be an arm of the state and, further, that the First Circuit's analysis is flawed because it fails to give adequate deference to the Commonwealth of Puerto Rico's decisions regarding PRCCCC. These arguments are legally and factually devoid of merit. The state legislature's subjective intent at the time it drafted PRCCCC's enabling statute, although instructive, is **not** controlling. Furthermore, the First Circuit carefully considered PRCCCC's enabling statute and other state law and properly concluded that the Commonwealth did not structure PRCCCC as an arm of the state for Eleventh Amendment purposes.

Second, PRCCCC asks whether the federal circuits' interpretation of *Hess* is consistent with this Court's later

1. The Petition for Writ of Certiorari incorrectly identifies Respondent as Fresenius Medical Care Cardiovascular Center Corp.

rulings that emphasize the need to protect a state's "dignity interests." According to PRCCCC, the First Circuit's arm-of-the-state analysis improperly gives dispositive weight to whether a state would be responsible for the financial obligations of an entity. Again, PRCCCC's argument lacks merit. *Hess* expressly recognizes the "vulnerability of the State's purse" as the "most salient" factor in the arm-of-the-state analysis. And, the federal circuits consistently hold that the most important factor in determining whether arm-of-the-state status applies is the impact on the state treasury.[2] Later cases decided by this Court did not abrogate this rule. Furthermore, the First Circuit expressly considered the dignity interests that might be implicated in reaching its conclusion that PRCCCC was not entitled to Eleventh Amendment immunity.

Third, PRCCCC asks whether a specialized medical care, research and training facility established by the state legislature, integrated into Puerto Rico's public health care system and to some degree funded and indemnified by Puerto Rico should be deemed an arm of the state. PRCCCC argues that it should; but this argument is without any legal authority and is based on a distorted interpretation of the First Circuit's opinion. The First Circuit's holding does not give rise to this question. The court did not imply, let alone hold, that special purpose public entities can **never** be an arm of the state. It simply concluded that the facts in **this case** did not support the conclusion that PRCCCC performed governmental functions.

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2. The only possible exception is the Seventh Circuit in *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 401 (7th Cir. 1996) (declining to decide if the most important factor in Eleventh Amendment determination is the impact of a judgment on the state treasury).

The gist of PRCCCC's arguments — and its (purported) compelling justification for why this Court should review the First Circuit's decision — is that the federal circuits are in "substantial disarray" over the application of this Court's arm-of-the-state analysis set forth in *Hess* and *Regents*, and that the First Circuit's own analysis was flawed. PRCCCC urges this Court to "clarify" the standard for determining when an entity is an arm of the state for Eleventh Amendment immunity purposes or risk a "further fracture and fragmentation" among the circuits. In truth, PRCCCC is requesting the Court to **change** the Supreme Court's controlling arm-of-the-state test.

As developed below, the First Circuit's opinion is grounded firmly upon the factual record and the law; and its decision that PRCCCC is not an arm of the state entitled to Eleventh Amendment immunity is proper in all respects. This Court's arm-of-the-state analysis, as set forth in *Hess* and reaffirmed in *Regents*, provides that where objective indicia of immunity point in different directions, the court should assess whether the state will be liable for a judgment against the entity. The First Circuit applied this test and, finding that the indicia of immunity weighed both for and against a finding of immunity, looked to the impact on the state treasury. It concluded that the Commonwealth would not be obligated for a judgment against PRCCCC and, therefore, PRCCCC was not entitled to Eleventh Amendment immunity.

Also contrary to PRCCCC's assertion, there is no division among the courts of appeals justifying review of the decision in this case. The Supreme Court has established a general framework for determining whether an entity is an arm of the state for purposes of Eleventh Amendment

immunity, articulating various factors or "indicators" of immunity to consider in the analysis. Any seeming variance between the circuits has been exaggerated by PRCCCC. The federal circuits have consistently sought to follow *Hess* and its progeny, and a review of the circuits' decisions establishes that they are in substantial harmony.

This Petition is simply the last in an endless stream of efforts to avoid litigating the underlying case on the merits. Respondent therefore respectfully urges this Court to deny the Petition for Writ of Certiorari.

FACTUAL AND PROCEDURAL BACKGROUND

This action involves a dispute over PRCCCC's obligations under an Agreement for Open-Heart Services dated January 1, 1998 (the "Agreement") between FMC and PRCCCC. On September 28, 2001, FMC filed a complaint in the United States District Court in Puerto Rico against PRCCCC for breach of the Agreement as well as breach of the implied covenant of good faith and fair dealing, specific performance, and declaratory judgment. App. at 3a.[3]

On or about November 13, 2001, PRCCCC moved to dismiss the complaint on the grounds that: (1) the Court lacked *in personam* jurisdiction over PRCCCC because the individual who received the summons and complaint was not authorized to receive service of process; (2) FMC lacked standing to sue because the name Fresenius Medical Care Cardiovascular Resources, Inc. did not appear in the original contract with PRCCCC; and (3) PRCCCC is immune from

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3. All references to the Appendix ("App.") shall be to the Appendix included in PRCCCC's Petition.

suit in federal court under the Eleventh Amendment because it is an arm of the Commonwealth. *Id.*

The district court denied PRCCCC's motion to dismiss in its entirety by way of an opinion and order dated March 18, 2002. *Id.* The district court found, as a matter of law, that service of process was proper, that FMC had standing to sue, and that PRCCCC does not enjoy Eleventh Amendment immunity. App. at 4a.

PRCCCC filed two motions for reconsideration of the Court's decision, both of which were denied in an opinion and order dated May 7, 2002. *Id.*

On May 21, 2002, PRCCCC filed an interlocutory appeal in the First Circuit Court of Appeals, seeking a reversal of the district court's March 18 and May 7 opinions and orders. *Id.* Reviewing *de novo* the district court's conclusion in light of the Supreme Court's decisions in *Hess* and *Regents*, *supra*, the First Circuit affirmed the district court's decision that PRCCCC is not an arm of the state entitled to Eleventh Amendment immunity. App., at 37a.[4]

Following an unsuccessful petition for rehearing *en banc* by the First Circuit, PRCCCC now appeals to this Court to decide the issue.

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4. The First Circuit also recognized PRCCCC's dilatory behavior, which has plagued this case from the beginning. *See* App. at 5a n.3 ("[T]he conduct of [PRCCCC] evidences a pattern of causing delay in this litigation, both in this court and the district court, including missing filing deadlines after those deadlines were extended.").

REASONS FOR DENYING THE PETITION

I. The First Circuit Properly Applied This Court's Arm-Of-The-State Analysis As Set Forth In *Hess v. Port Auth. Trans-Hudson Corp.* And *Regents Of The Univ. Of Cal. v. Doe*

The Petition purports to seek resolution of what qualifies an entity as an arm of the state for purposes of Eleventh Amendment immunity.[5] The analysis to be applied, however, has been clearly set forth in two recent decisions: *Hess v. Port Auth. Trans-Hudson Corp.* and *Regents of the Univ. of Cal. v. Doe.*

In *Hess*, the Supreme Court was asked to determine whether a bistate entity created under the Compact Clause of the U.S. Constitution — the Port Authority of New York and New Jersey — was an arm of the state entitled to Eleventh Amendment immunity.[6] Beginning with the presumption that a Compact Clause agency does not qualify

5. The Eleventh Amendment provides states with immunity from suit in federal court without their consent. U.S. Const. amend. XI. This Court has taken a broad view of sovereign immunity, interpreting the Eleventh Amendment to bar suits not only against a state but against an entity that acts as an arm or alter ego of the state. *Regents*, 519 U.S. at 429; *Poindexter v. Greenhow*, 114 U.S. 270, 287 (1885); *In re Ayers*, 123 U.S. 443, 487 (1887); *Smith v. Reeves*, 178 U.S. 436, 438-39 (1900); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945).

6. PRCCCC suggests, for the first time, that *Hess* may not apply to intra-state entities. This argument should be disregarded. *See United States v. Ortiz*, 422 U.S. 891, 898 (1975) (declining to address argument raised for first time in petition for cert). In addition, the argument is both illogical and unfounded. *See Auer v. Robbins*, 519 U.S. 452, 456 n.1 (1997) (briefly applying *Hess* to intra-state entity to find no immunity).

for immunity "'unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves . . . ,'" the Court set forth a two step analysis. 513 U.S. at 43-44 (quoting *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 410 (1979)). Thus, the Court began its arm-of-the-state analysis by first evaluating whether the state structured the entity to enable it to enjoy the protections afforded by the Eleventh Amendment. 513 U.S. at 44. Factors or "indicators" of immunity considered by the Court in its evaluation included: (1) the extent of state control over the entity; (2) characterization of the entity under state law (both legislative and case law); (3) functions performed by the entity; and (4) the extent of the state's financial responsibility for the entity's debts, including judgments. *Id.* at 44-46.

Finding that these indicators pointed in different directions, the Court explained that "the Eleventh Amendment's twin reasons for being" — preserving a state's dignity and financial solvency — should serve as the "prime guide." *Id.* at 47. Reasoning that suit in federal court would not be an affront to the dignity of a Compact Clause entity or the states that created it because such entities are created constitutionally by **both** state and federal governments, *see id.* at 41-42, the Court looked at whether a judgment would be paid out of the state's treasury. The Court recognized this factor — the risk to the state treasury — as "the most salient factor in Eleventh Amendment determinations." *Id.* at 48.

More recently, the Court revisited the issue of who is entitled to Eleventh Amendment immunity in *Regents*. This time the Court granted certiorari to address the "narrow question" of whether the federal government's agreement to

indemnify a state instrumentality against the costs of litigation, including an adverse judgment, divests the state agency of Eleventh Amendment immunity. 519 U.S. at 426. The answer required the Court to resolve a division among the circuits as to whether courts should focus on legal, or financial, liability when evaluating the extent of a state's responsibility for an adverse judgment. The Court reaffirmed that "the question whether a money judgment against a state instrumentality . . . would be enforceable against the State is of considerable importance to any evaluation of the relationship between the State and the entity. . . ." *Id.* at 430. It held, however, that the presence or absence of a **third party's** undertaking to indemnify the agency is irrelevant to the outcome. *Id.* at 431.

PRCCCC urges the Court to revisit these decisions and review the First Circuit's application of them to the facts of this case. This request should be denied. The First Circuit applied *Hess*, *Regents* and the cases that followed properly and in a manner that is consistent with the approach of the other circuits. Indeed, rather than having its decision questioned, the First Circuit's analysis and result should be applauded.

A. The First Circuit Gave Sufficient "Deference" to State Law

PRCCCC argues that the First Circuit did not give adequate deference to the state's characterization of PRCCCC but instead narrowly interpreted the enabling statute, ignored relevant provisions and established a presumption against a finding of Eleventh Amendment immunity.[7] A review of the First Circuit's opinion reveals that nothing could be farther from the truth.

7. PRCCCC also complains that the First Circuit imposed a burden of proof on PRCCCC that was too stringent. PRCCCC cites (Cont'd)

First, the First Circuit began its analysis by expressly acknowledging that *Hess* required it to consider how the Commonwealth structured PRCCCC:

> **The first step of the analysis concerns how the state has structured the entity**. This step, we think, pays deference to the state's [dignity] interest in extending or withholding Eleventh Amendment immunity from an entity. After all, a state may easily make clear by statute its view that an entity is to share the state's immunity. Where the state has not made a clear statement, its dignity interests are nonetheless protected by an examination of the structure the state has chosen to establish. **In evaluating whether the state had structured an agency to be an arm of the state, *Hess* looked at 'various indicators of immunity or the absence thereof.'**

App. at 15a (quoting *Hess*, 513 U.S. at 44) (emphasis added).

Second, the First Circuit applied the *Hess* factors and carefully considered whether the Commonwealth structured PRCCCC to share its sovereignty. It reviewed: (1) Puerto Rico's enabling statute (App. at 23a-24a) (recognizing factors that weighed in favor of immunity but concluding that statute

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(Cont'd)

no legal authority in support of its argument, which is wholly without merit. It is well settled that a party seeking to establish Eleventh Amendment immunity bears the burden of proof. *Wojcik v. Mass. State Lottery Comm'n*, 300 F.3d 92, 99 (1st Cir. 2002); *Gragg v. Ky. Cabinet for Workforce Dev.*, 289 F.3d 958, 963 (6th Cir. 2002); *Carter v. City of Philadelphia*, 181 F.3d 339, 347 (3d Cir. 1999), *cert. denied*, 528 U.S. 1005.

"does not by its terms structure PRCCCC to be an arm of the state"); (2) other Commonwealth statutes (App. at 24a-26a) (rejecting contention that definition of "public funds" in 33 P.R. Laws Ann. § 3022 (11), (14) made all public corporations in Puerto Rico arms of the state and rejecting argument that PRCCCC employees are public employees under the Penal Code of Puerto Rico); and (3) other Commonwealth law (App. at 26a-27a) (noting there were no state court decisions holding that PRCCCC is an arm of the state). The First Circuit also considered the functions performed by PRCCCC and the amount of control exerted by the Commonwealth over PRCCCC. App. at 27a-30a. All of these factors — state characterization of an entity, the extent of state control and the entity's functions — were recognized by this Court in *Hess* as relevant to the arm-of-the-state analysis. 513 U.S. at 44-46.

Third, the state's view — even if clear — is not controlling. As noted by the First Circuit, the "ultimate issue is still a federal question for the courts to decide." App. at 16a. The circuits are in agreement with this fundamental premise. *See Harter v. Vernon*, 101 F.3d 334, 342 (4th Cir. 1996), *cert. denied*, 521 U.S. 1120 (1997) (courts may defer to state court rationale but holding is not dispositive); *Gray v. Laws*, 51 F.3d 426, 437 (4th Cir. 1995) (cautioning against overreliance on state court decision if "there is no reasoning provided for the . . . court's conclusion."); *Duke v. Grady Mun. Sch.*, 127 F.3d 972, 978 (10th Cir. 1997) (state court decision not dispositive on issue of Eleventh Amendment immunity); *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 991 F.2d 935, 942 (1st Cir. 1993) (same). Although PRCCCC professes that it is not seeking total deference to state legislative and policy decisions, that is precisely what it is asking this Court to do. Neither *Hess* nor *Regents*, however, requires federal courts to defer entirely to

how the state structured an entity; these cases require that courts "consider[] the provisions of state law that define the agency's character." *Regents*, 519 U.S. at 430 n.5. This is exactly what the First Circuit did. That PRCCCC disagrees with the outcome is not a basis for further review.

B. There is No Presumption in Favor of Granting Arm-of-the-State Status

In its Petition, PRCCCC suggests that this Court's decisions in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) and *FMC v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) ("*Federal Maritime*") create a presumption in favor of arm-of-the-state status. FMC respectfully disagrees that these decisions apply to the issue at bar or that they support the presumption asserted by PRCCCC. They do not address **who** is entitled to Eleventh Amendment immunity. Rather, they address the extent of such immunity.

Thus, in *Federal Maritime*, there was no dispute that the state port agency was entitled to Eleventh Amendment immunity from private suits in federal court. The question was whether this protection extended to administrative proceedings. This Court held that it did, reasoning that the affront to state dignity that would result from being haled into federal court was no less where the tribunal was administrative. 535 U.S. at 760. The case does not hold, however, that in determining whether an entity is an arm of the state, a presumption in favor of such status applies. Similarly, *Seminole Tribe* held that Congress did not have authority to abrogate a state's Eleventh Amendment immunity. 517 U.S. at 51. It did not address the standard under which an entity is found to be an arm of the state and did not hold that a presumption in favor of such status protects state dignity interests.

C. The First Circuit Did Not Take an All or Nothing Approach

Following the Court's lead in *Hess*, the First Circuit applied a two-step analysis to determine whether PRCCCC was an arm of the state. First, it considered how PRCCCC had been structured under state law. Then, upon finding that the structural indicators pointed in different directions, the Court proceeded to the next step — considering the risk to the state treasury should a judgment be entered against PRCCCC.

PRCCCC argues that the First Circuit misapplied the first step of the *Hess* analysis. According to PRCCCC, the First Circuit improperly required **"all"** of the indicia to point to arm-of-the-state status before granting Eleventh Amendment immunity. In sole support of this argument, PRCCCC cites to the following language from the opinion: "We cannot say the indicia all point in the direction of PRCCCC being an arm of the state and so we reach the second stage of the analysis."[8]

PRCCCC grossly misinterprets the First Circuit's analysis as taking an "all or nothing" approach. The First Circuit did not require that all indicia favor a determination that an entity is an arm of the state; indeed, if this were the case, the inquiry would have stopped after the first step as there would have been no need to proceed to the second step of the analysis. This Court recognized in *Hess* that if the indicators of immunity point in **different** directions, the inquiry is whether a finding of immunity would implicate

8. PRCCCC also argues that the First Circuit's approach conflicts with the other circuits. This argument is addressed in section II, *infra*.

the state's dignity or financial solvency. 513 U.S. at 47. This is exactly what occurred here: the First Circuit determined that the factors relied upon pointed in different directions (*i.e.*, some favored and some disfavored a finding of immunity); therefore, it was necessary under *Hess* to proceed to the second step of the analysis and ask whether there would be an impact on the state treasury.[9]

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9. The First Circuit also considered the impact on the state's dignity interest:

> We start with the larger Eleventh Amendment doctrine. . . . The . . . Supreme Court has said that it is not just the state's interest in its public treasury which is at stake in the assertion of Eleventh Amendment immunity. The state also has a 'dignity' interest as a sovereign in not being haled into federal court. . . . These twin goals of the Eleventh Amendment—protection of the state's treasury and of its [dignity] interests—explicitly govern the arm-of-the-state analysis.
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> * * *
>
> The first step of the analysis [how the state structures an entity] . . . pays deference to the state's [dignity interest] in extending or withholding Eleventh Amendment immunity from an entity.

App. at 11a, 15a (citations omitted). The Second Circuit has taken a similar approach. *See Mancuso v. New York State Thruway Auth.*, 86 F.3d 289, 296 (2d Cir. 1996), *cert. denied*, 519 U.S. 992 (holding that subjecting Thruway Authority to suit in federal court would not be an affront to the state of New York where Thruway existed independently from state; was not under significant state control; and was self-funded).

D. The First Circuit Properly Considered the Impact on the State Treasury

PRCCCC argues that the First Circuit improperly applied the second step of the *Hess* analysis by requiring that a state provide most, if not all, of the operating funds of an entity. PRCCCC has again misinterpreted the First Circuit's holding and — consistent with past practices — distorted the factual record in this case.

The First Circuit — like nearly every other circuit — places great weight on whether or not a judgment will be paid out of the state's treasury. PRCCCC complains, however, that the court took a "cramped temporal view" by focusing only on the Commonwealth's most recent appropriations and requiring that PRCCCC be entirely dependent on the Commonwealth. In so doing, PRCCCC misrepresents the First Circuit's opinion. The First Circuit did **not** disregard PRCCCC's fiscal history; to the contrary, it relied upon this history in concluding that PRCCCC's financial dependence on the Commonwealth was minimal. Likewise, nowhere did the First Circuit hold that an entity must be **entirely** dependent upon the state's financial resources before qualifying for immunity; it did, however, correctly require **greater** financial dependence than was illustrated by PRCCCC.

It is PRCCCC who is asking this Court to view its financial "dependence" in a vacuum, urging this Court to overturn the First Circuit decision on the basis that **ten** years ago, the Commonwealth contributed 64% of PRCCCC's operating revenues.[10] PRCCCC, however, completely ignores

10. This figure is misleadingly high, as it includes **both** legislative appropriations and insurance reimbursements which flow to all hospitals. App. at 34a-35a.

the following evidence — recognized by the First Circuit — all of which weighs **against** a finding that the Commonwealth would be liable legally or financially for PRCCCC's debts:

- The enabling statute does not provide for the funding of PRCCCC's debts. App. at 31a.

- The Commonwealth is free to provide or not provide funds to PRCCCC, as it sees fit, and has expressly provided for independent sources of funding. *Id.*

- The Commonwealth has provided for independent sources of revenue, authorizing that PRCCCC to, among other things, borrow money; sell its services and materials to private entities; request and accept grants; and enter partnerships, joint ventures or associations with others. App. at 31a-32a.

- PRCCCC's revenues consist, in large part, of fees for patient services received from private insurance companies as well as the public Medicare and Medicaid programs — just as revenues come into private hospitals in Puerto Rico. App. at 34a.

- State funding has diminished significantly with each passing year, with the majority of funding increasingly coming from sources other than the state treasury. Legislative appropriations amounted to less than 14% of PRCCCC's total revenues from fiscal years 1993 to 2001, and in the fiscal years 2001 and 2002, PRCCCC received **no** legislative appropriations. App. at 31a, 33a-35a.

- Nothing distinguishes PRCCCC's debt from that of other private institutions. App. at 35a-36a.

PRCCCC also argues that the First Circuit focused only on whether the Commonwealth would be financially responsible for a judgment and failed to consider the Commonwealth's potential "legal" liability. This argument is misplaced. The requirement that courts consider not only the financial but the legal liability of a judgment was meant to address a situation such as that in *Regents*, where a state, although liable, might avoid dipping into the fisc because a third party has agreed to indemnify the loss. This situation is not present here. Moreover, the First Circuit's analysis expressly considered whether the state would be obligated to pay a judgment **both legally and practically**. App. at 30a. As set forth above, PRCCCC simply failed to offer adequate evidence to support the conclusion that the Commonwealth would be liable — legally or financially — for a judgment against PRCCCC.

II. The Circuits Are In Substantial Harmony

PRCCCC also seeks review on the premise that the circuits are split as to the application of *Hess*, in particular the weight to be accorded each of the factors under the first part of the analysis. A review of the circuits' Eleventh Amendment jurisprudence reveals that PRCCCC's argument lacks merit and its Petition should be denied. There is no division among the circuits.

Although there is understandably some slight variation among the circuits regarding the number of factors, the grouping of factors, and the order of analysis, the circuits are consistent in evaluating the **relationship** between the state and a particular entity for immunity purposes. Thus, while some courts have analyzed more critically the manner in which to apply the various factors relevant to the

determination of Eleventh Amendment immunity, since *Hess* the circuits have uniformly held that where the structural analysis creates ambiguity, the most important factor is whether the potential payment will come from the state treasury. *Duke*, *supra*, 127 F.3d at 974 n.4; *see Mancuso*, *supra*, 86 F.3d at 293 (where the factors are in "equipoise," the determination is guided by the twin reasons for the Eleventh Amendment); *Carter*, *supra*, 181 F.3d at 347 (weighing several factors to determine if an entity is an arm of the state and holding that the most important question is whether judgment would be paid from state treasury); *Harter*, *supra*, 101 F.3d at 338 (in determining entitlement to Eleventh Amendment immunity, a number of factors must be considered but state treasury factor is most important); *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 327 (5th Cir. 2002) (same); *Alkire v. Irving*, 330 F.3d 802, 813 (6th Cir. 2003) (first and most important factor under *Hess* is whether state would be legally liable for a judgment); *Hadley v. North Ark. Community Technical College*, 76 F.3d 1437, 1439 (8th Cir. 1996) (arm of the state analysis requires court to consider degree of local autonomy and control and, more importantly, whether judgment will be paid from state treasury); *Eason v. Clark County Sch. Dist.*, 303 F.3d 1137, 1141 (9th Cir. 2002), *cert. denied*, 154 L. Ed. 2d 1023 (2003) (first and most important factor is whether judgment would be satisfied out of state funds); *Sturdevant v. Paulsen*, 218 F.3d 1160, 1164 (10th Cir. 2000) (most important step in analysis, after characterization of state law and state control, is state treasury's liability); *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2002) (recognizing source of funding and responsibility for judgments as most dispositive factor); *but cf. Thiel*, *supra*, 94 F.3d at 401-03 (questioning emphasis on impact to state treasury in light of *Seminole Tribe* and finding it unnecessary

to consider whether judgment would be satisfied by state where other factors established immunity).

Moreover, all of the circuits rely on the factors enunciated in *Hess* (the extent of state control, characterization of the entity under state law, and functions performed by the entity). Any perceived difference is a dispute over semantics. For instance, the state "control" criterion is referred to as the "autonomy" factor in the Third, Fourth, Fifth and Sixth Circuits; and distilled into two factors (appointment of entity members and state veto power) in the Second Circuit.[11] Furthermore, even though the order of analysis slightly differs by circuit, the result reached is not affected. There is neither a direct conflict between circuits or considerable disagreement among the circuits. The factors applied, and the weight given to each of them, are in substantial harmony. The slight "differences" in the circuits' application of the *Hess* factors do not constitute a bona fide division warranting Supreme Court review.[12]

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11. For other examples of how the circuits have characterized the *Hess* factors, a summary in the form of a chart has been appended for the Court's convenience.

12. *See Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 776 (1994) (state supreme court decision "directly at odds" with federal proceeding); *Central Bank, N.A. v. First Interstate Bank*, 511 U.S. 164 (1994) (cert granted to resolve "continuing confusion"); *Hagen v. Utah*, 510 U.S. 399, 409 (1994) (cert granted to resolve "direct conflict" between decisions); *Morgan v. Illinois*, 504 U.S. 719 (1992) (cert granted because of "considerable disagreement" among courts); *Ring v. Arizona*, 536 U.S. 584 (2002) (cert granted to "allay uncertainty" in lower courts caused by "manifest tension" between earlier decisions).

PRCCCC's suggestion that the Court should **reconsider** whether a state's potential liability for a judgment remains the most significant factor in light of post-*Hess* decisions does not warrant consideration. According to PRCCCC, the deciding factor should be whether a state's "dignity" will be affronted. PRCCCC's argument misses the point. There is no dispute that protecting a state's dignity is an underlying concern, or rationale, of the Eleventh Amendment. *Hess*, 513 U.S. at 39 ("'The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity'") (citations omitted). The dignity interest is not, however, an independent "factor" or "indicia" of immunity. Indeed, this notion begs the very question being asked. A state's interest in sovereign immunity cannot be affronted, where as here, the entity is not an arm of the state. The post-*Hess* cases that PRCCCC relies upon (*Federal Maritime* and *Seminole Tribe*) do not alter this Court's jurisprudence concerning the determination of whether an entity is an arm of the state for purposes of Eleventh Amendment immunity. As explained above, those cases do not address **to whom** Eleventh Amendment immunity applies. Rather, they address the application of Eleventh Amendment immunity in circumstances not present here and leave undisturbed the pronouncement in *Hess* and *Regents* that state financial liability is the "most salient factor." What PRCCCC is advocating — recognizing that it cannot meet the test for Eleventh Amendment immunity — is not a clarification of existing law. It is advocating that this Court **change** the arm-of-the-state analysis established in *Hess* and *Regents*.

III. PRCCCC's Status As A Special Purpose Health Care Facility Does Not Entitle It To Arm-Of-The-State Status

PRCCCC argues that the First Circuit "effectively ruled" that a public corporation that provides health care services would **never** be entitled to Eleventh Amendment immunity, and that the First Circuit's analysis, if adopted, "would categorically disqualify a sweeping array of public health initiatives pursued by states." Petition at 19-20. This argument is unfounded and should be rejected.

The First Circuit's opinion does not hold what PRCCCC claims nor does it threaten such wide-reaching implications. Although the court found that **PRCCCC** was not distinguishable from a private sector hospital and did not serve a uniquely governmental function, it did not hold that Eleventh Amendment immunity could **never** be granted to a special purpose public corporation.

PRCCCC argued to the First Circuit that it functioned as a governmental agency for three reasons: (1) PRCCCC was created to comply with the Commonwealth's obligation to provide health care to indigent residents; (2) PRCCCC's enabling statute provides that it is responsible for establishing public policy relating to the provision of cardiovascular services; and (3) PRCCCC's mission includes training medical students, interns and residents from the state's public university. These arguments were and are unavailing. That PRCCCC may have a "responsibility [for] . . . framing or executing public policy" does not make it part of the government. Indeed, there are numerous private organizations and charities that influence and make public policy in a variety of fields. Likewise, that PRCCCC is a training site

and research center for cardiovascular care for members of the state medical school does not make PRCCCC a public health entity. "[M]any hospitals unaffiliated with state governments (or the Commonwealth) employ (and train) interns and residents from state medical schools." App. at 28a. Finally, the First Circuit did not categorically reject PRCCCC as an arm of the state. Rather, the First Circuit considered each of PRCCCC's arguments and found them to be without merit:

> PRCCCC presents no evidence indicating that it has helped set policies applicable to other facilities in Puerto Rico. It acknowledges, moreover, that since the Commonwealth carried out a major health reform in 1993, PRCCCC had competed with private hospitals for legislative appropriations and other public funds allocated for cardiovascular surgery.
>
> * * *
>
> Medical care in Puerto Rico . . . is provided by a combination of private and public sector entities. Even medical care for the poor is a responsibility often imposed on private hospitals, through free care pools, Medicaid, and other devices. . . . That PRCCCC receives Medicaid funding does not distinguish it from a private sector hospital, either not-for-profit or for-profit. A mosaic of medical providers serves the poor and the uninsured, and **nothing about PRCCCC marks it as serving a uniquely governmental function**.

App. at 28a-29a (emphasis added).

In essence, PRCCCC urges this Court to hold that every medical clinic or hospital which performs any sort of public health services be deemed an arm of the state. This argument was not made to the First Circuit and, therefore, should be disregarded. *United States v. Ortiz*, 422 U.S. at 898. Moreover, there is no support for such a sweeping proposition. Whether an entity is an arm of the state is made on a case-by-case basis. *Wojcik*, 300 F.3d at 101 ("Gross generalizations about entities performing similar functions in different states are not helpful."). There is no precedent for the notion that certain types of entities should automatically qualify or be presumed to be arms of the state.

CONCLUSION

For all the foregoing reasons, FMC respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Appendix
Summary of Federal Circuits' Eleventh Amendment Jurisprudence

The following table illustrates the consistency among the federal circuits in applying *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994). The first column identifies those factors relied upon by the Court in *Hess* to evaluate whether an entity is an arm of the state. The remaining columns identify how the federal circuits have characterized those same factors.

Hess[1]	1st Cir.	2nd Cir.	3rd Cir.	4th Cir.	5th Cir.	6th Cir.	7th Cir.	8th Cir.	9th Cir.	10th Cir.	11th Cir.
State control	Control	Appt. of governing members[2] Veto	Autonomy	Autonomy	Autonomy	Autonomy[3] - *Sue* - *Property* - *Tax*	Control	Autonomy - *Control* - *Status*		Autonomy - *Control* - *Status*	Control
State characterization	Status	Status	Status - *function included in analysis*	Treatment	Status	Status			Status		Status
Function	Function	Function		Concerns	Concerns	Concerns	Agent[4]		Function		
Liability	Liability	Liability Source of Funding	Liability	Liability	Funding	Liability	Liability	Liability	Liability	Liability[5] - *Ind. Fin.* - *Bond/Tax*	Liability - *Funding*
Other					Sue[6] Property				Sue Property		

[1] In *Hess*, the Court looked at several "indicators of immunity" in evaluating whether the state had structured an entity as an arm of the state. These indicators included: (1) the extent of state control, including the appointment of board members and the state's power to veto board actions or increase the entity's responsibilities; (2) how the enabling legislation characterized the entity and how the state courts have viewed the entity; (3) whether the entity's functions could be classified as governmental; and (4) whether the state bore liability for the entity's debts. 513 U.S. at 44-51.

[2] The Second Circuit considers two factors – how the governing members of the entity are appointed and whether the state has veto power over the entity's actions ("Veto") – to determine the extent of state control maintained over the entity.

[3] Relevant to the Sixth Circuit's analysis of the autonomy factor are whether an entity can sue or be sued in its own name ("Sue"), hold property in its own name ("Property"), and whether it is immune from state taxation ("Tax"). *See Alkire v. Irving*, 330 F.3d 802, 813 (6th Cir. 2003).

[4] What the Seventh Circuit refers to as acting as an agent of the state ("Agent") is essentially a determination of an entity's role or function. *See Thiel v. State Bar of Wisconsin*, 94 F.3d 399 (7th Cir. 1996).

[5] To determine whether a state is liable for judgments against an entity, the Tenth Circuit evaluates the extent of the entity's independent financing ("Ind. Fin") and its ability to provide its own financing through issuing bonds and levying taxes ("Bond/Tax"). *See Duke v. Grady Mun. Sch.*, 127 F.3d 972 (10th Cir. 1997).

[6] Rather than subsuming the "Sue" and "Property" factors under the "Control" factor as the Sixth Circuit does, the Fifth and Ninth Circuits weigh them as independent factors. *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318 (5th Cir. 2002); *Eason v. Clark County Sch. Dist.*, 303 F.3d 1137 (9th Cir. 2002).